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No. 10- 10-205

IN THE

Supreme Court of the United States

U.S. INFORMATION SYSTEMS, INC., ODYSSEY GROUP INC., and BLUE DIAMOND FIBER OPTIC NETWORKS, INC.,

Petitioners,

– v. –

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NUMBER 3, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying a heightened summary judgment standard that misconstrues *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 451 (1986), and ignores *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), by requiring summary judgment in an antitrust conspiracy case where the parties' positions are found to be "equally plausible," and the defendants' claim to "independent action" involves them advancing and benefitting consciously from unlawful and inherently anticompetitive conduct.

2. Whether the court of appeals improvidently encroached upon the province of a jury, and violated fundamental strictures of summary judgment jurisprudence, by improperly weighing and deconstructing evidence and denying plaintiffs the benefit of reasonable inferences on the grounds that each piece of evidence was susceptible to competing inferences favorable to the defense.

PARTIES TO THE PROCEEDING

1. U.S. Information Systems, Inc. ("USIS"), Odyssey Group, Inc. and Blue Diamond Fiber Optic Networks, Inc. ("Blue Diamond") (collectively "plaintiffs" or "Petitioners") are Petitioners before this Court and were the plaintiffs/Appellants below.

2. International Brotherhood of Electrical Workers Local Union Number 3, AFL-CIO, and Local 3 signatory contractors ADCO Electrical Corporation, Five Star Electrical Corporation ("Five Star"), Nead Information Systems ("Nead"), Hugh O'Kane Electric Company, LLC ("Hugh O'Kane"), A&R Electrical, Maintenance, Inc., Forest Electric Corporation ("Forest"), IPC Communications, Inc. ("IPC") and A R Communications Contractors, Inc., are the Respondents here and were the defendants below (collectively "Respondents" or "defendants").*

RULE 29.6 DISCLOSURE

None of the Petitioners has a parent company and no publicly held company owns 10% or more of the shares of the stock of any Petitioner.

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* Except that Forest and IPC have settled and are thus not participating in this application.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals, as entered on February 19, 2010, is reprinted in the Appendix at pages 1a–5a. The order of the Court of Appeals denying rehearing and rehearing as entered on May 12, 2010, *en banc*, is reprinted at pages 56a–57a. The decision and order of the district court granting summary judgment entered on September 18, 2007 is reprinted in the Appendix at pages 6a–12a. The Report and Recommendation of James C. Francis IV, Magistrate Judge, entered on August 3, 2007, is reprinted in the Appendix at pages 13a–55a.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on February 19, 2010. The Court of Appeals denied Petitioners' timely petitions for rehearing and rehearing *en banc* on May 12, 2010. App. 56a–57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Rule 56 of the Federal Rules of Civil Procedure. These provisions are set forth in App. E 56a-62a.

STATEMENT OF THE CASE

This petition presents significant and still unanswered questions concerning the standard for summary judgment in an antitrust conspiracy case. These questions arise in a novel context outside the familiar realm of predatory and oligopoly price coordination and in connection with a factually and theoretically plausible conspiracy for which there is no benign or socially redeeming explanation. The conspiracy encompasses facially anticompetitive and egregious criminal conduct, including extortion. App. C 51a. It was acknowledged below that this conduct benefited the defendants competitively and economically by thwarting lower priced competition posed by the plaintiffs. It is virtually certain that, inherently and by design, the conduct has resulted in artificially inflated prices in a discrete and economically significant market. App. C 48a–49a.

This petition exemplifies how misinterpreting *Matsushita*'s "tends to exclude" standard to require direct evidence of conspiracy in inappropriate factual and legal contexts leads to encroachment upon the fact-finding province of a jury, and abrogates the most fundamental precept of summary judgment jurisprudence that all reasonable inferences should be drawn in favor of the non-moving party. The courts

below held that the range of permissible inferences was limited by antitrust law to those which could be drawn unequivocally in plaintiffs' favor from individual pieces of evidence dismembered from the whole of plaintiffs' case. The focus was on whether *any* competing inferences could be drawn in defendants' favor, rather than on the reasonableness or probative value of the inferences favoring plaintiffs. It was from this misguided perspective that it was determined below that the respective positions of the parties were "equally plausible," and that, accordingly, the case could not be permitted to proceed to trial. App. C 51a.

This case involves a market and an industry which have proven historically to be highly conducive to collusion, and a notorious trade union, Local 3 of the International Brotherhood of Electrical Workers ("Local 3"), which has defied federal law and been the catalyst for anticompetitive and exclusionary trade practices for well over a half a century. Plaintiffs, as victims, have been damaged competitively from a conspiracy among the defendants to exclude lower priced competition in the multi-billion dollar market for the installation of low voltage cable and fiber for telephone data and video service ("tel-data") on major construction projects in the New York City Metropolitan area.

The challenged collusive and anti-competitive practices in this case are similar to those that were engaged in by the same union and found to violate the antitrust laws by the Court sixty-five years ago in its seminal decision in *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797 (1945). The challenged practices

include threats, work stoppages and vandalism as part of an aggressive and coordinated campaign among Local 3 and its signatory contractors to prevent firms using less costly and more qualified labor provided by the Communications Workers of America ("CWA") from obtaining tel-data work on major New York City construction projects. As in *Allen Bradley*, the campaign in this case is one of fear and intimidation aimed at fostering an industry wide understanding as to the nature of Local 3's jurisdictional claim and coercive demands for exclusive dominion over the relevant tel-data market and the consequences for those who fail to accede to those demands.

The defendants' tactics succeeded, not only in preventing more qualified CWA contractors with more competitive bid proposals from winning or even being considered for tel-data contracts, but also in persuading customers to cancel or rescind contracts that had already been awarded to CWA contractors after work had begun. Such conduct, even had it been engaged in by Local 3 or the contractors independently, is illegal under prevailing and directly analogous authorities which hold that refusals to deal or exclusive dealing arrangements coerced by threats of labor disruptions violate Section 1 of the Sherman Act, as well as federal labor laws. *See, e.g. MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.*, 62 F.3d 967 (7th Cir. 1995); *Altemose Constr. Co. v. Atl. Cape May*, 493 F. Supp. 1181 (D.N.J. 1980); *C&W Constr. Co. v. Bhd. of Carpenters & Joiners of Am., Local 745*, 687 F. Supp. 1453 (D. Haw. 1988).

The factual and legal context of plaintiffs' claims below included Local 3's unparalleled record of

unlawful and recidivist secondary boycott activity, much of it directed to the enforcement of the union's "total job" policy. *Local 3, IBEW v. Gen. Dynamics Commc'ns Co.*, 264 N.L.R.B. 705, 709–10 (1982) *aff'd. mem.*, 742 F.2d 1438 (2d Cir. 1983); *see also Silverman v. Local 3, IBEW*, 81 Civ. 6936, 1981 WL 2234 (S.D.N.Y. Dec. 23, 1981). Local 3's relentless pursuit of this policy, specifically to keep CWA contractors out of the tel-data market through work stoppages, vandalism and violence, has been documented by a series of adverse adjudications by the National Labor Relations Board ("NLRB") and the federal courts. *See NLRB v. Local 3, IBEW*, 861 F.2d 44, 45–46 (2d Cir. 1988); *NLRB v. Local 3, IBEW*, 730 F.2d 870, 880 (2d Cir. 1984) (additional citations omitted).

Summary judgment was granted in this case without accounting for Local 3's recalcitrant history, or considering the ease with which a trade union with Local 3's reputation and track record could have facilitated collusion and concerted action amongst contractors with whom it shared key decision-making and management personnel, common economic interests and a motive to conspire.

I. FACTUAL BACKGROUND

Virtually all large commercial construction projects in New York City use only union labor. The various components of these projects are competitively bid as subcontracts and, absent unusual circumstances, awarded to the pre-qualified contractor submitting the lowest bid. Petitioners are contractors specializing in the installation of tel-data

cable and fiber who employ members of the CWA. Respondents are Local 3 and several major electrical contractors who employ Local 3 labor. Traditionally, Local 3 has specialized in the installation of high voltage electrical cable ("electrical work") and such work has come under its exclusive jurisdiction. With the emergence of the telecommunications market, Local 3 has sought to establish exclusive dominion over tel-data installation work as well. Claims by Local 3 for exclusive jurisdiction over that work, nevertheless, have been rejected repeatedly by the NLRB.

For a variety of reasons, including relative risk, CWA tel-data technicians command a lower wage than Local 3 electricians. However, CWA contractors specialize in and employ specially trained workers, and thus are inherently more qualified than conventional contractors. Because they are not bound by the Local 3's higher wage scales, CWA contractors are able to significantly underbid Local 3 contractors by as much as 30%. With CWA contractors offering equivalent or better services at a much lower cost, Local 3 contractors found themselves in the 1990's at a competitive disadvantage and losing business to CWA contractors. (JA-1490; *see also* JA-3062–65.)

A. The Conspiracy to Eliminate Competition.

In or about September 1998, Robert Eccles, Nead's Executive Vice President, complained to Howard Cohen, a Local 3 business agent, that Nead was losing an inordinate number of bids to CWA contractors. (JA-1645.) On September 1, 1998, Eccles

wrote to Mark Hansen, another Local 3 business agent, that "[w]e are losing as much work to CWA as we are winning and [it is] getting worse"; "the amount of work since January that has gone to CWA is staggering." (JA-2529.) In his letter, Eccles solicited a meeting with Local 3 "to discuss this problem and review any recommendations you may have to competing in this marketplace [sic]." *Id.*

Ten days after Eccles' September 1, 1998 letter, Arnold Johnson of IPC prepared a memorandum addressing the same issue. Referencing their ongoing discussions pertaining to this matter, Johnson cited approximately twenty projects which he stated were "bid this year and have been lost by Local #3 to CWA." (JA-2521.) Local 3 responded to these concerns by holding a meeting with Local 3 contractors and representatives of Local 3's hierarchy to discuss the issue. A Nead memo concerning the meeting was entitled "CWA Problem with Respect to Compition [sic] Senario [sic], Procedure When Threatened by CWA and Future of Telecommunications with Local Three?" (JA-2528; *see also* JA-1646–51, 2098–99.)

As reflected in internal documents, deposition testimony and sworn statements, Local 3 and the defendant contractors immediately launched upon an unyielding and extortionistic campaign aimed at promoting fear and intimidation among the close-knit community of building owners, tenants, representatives and general contractors comprising the decision-makers who award subcontracts in New York City. The message quickly became clear: either use Local 3 contractors for tel-data installation or

suffer the consequences. As observed in the *Daubert* approved reports of plaintiffs' expert, Dr. Frederick Dunbar, vandalism and other significant work site disruptions were carried out by Local 3 contractors, including some who had not even bid on the tel-data work.

Threats by project managers, foremen and supervisors employed by the defendant contractors, also serving as Local 3's agents, were systematically conveyed to customers, general contractors and IT consultants both during the bidding process and after CWA contractors had been chosen to perform the tel-data work. Some customers were informed that no Local 3 contractor would perform electrical work as long as a CWA contractor was performing tel-data work. Many succumbed to the pressure not only by rejecting or refusing to consider CWA bids, but by abruptly cancelling existing contracts. Substantial labor disruptions on job sites where CWA contractors had been awarded the tel-data contracts ensued within a few months of the meeting addressing the "CWA problem." (*See, e.g.*, JA-1779–83, 2187, 2221–29. 2554–59.)

Obstructionism carried out by Local 3 and the defendant contractors in the months following the meeting and during other relevant time periods included:

- Work stoppages and delays in delivering labor to construction sites

- Refusals to work overtime

- Shutting down or refusing to turn on power, including to lights and freight elevators, to prevent other trades from performing work

- Refusing to cooperate with CWA contractors or to make electrical preparations necessary for telecommunication cable installation when a CWA contractor was hired to install the cable

- Walking off job sites and calling in sick immediately following the award of tel-data work to CWA contractors or upon their arrival at construction sites

- Breaking into CWA construction vehicles and stealing the equipment of CWA contractors

- Sabotaging tel-data work performed by tel-data contractors, damaging voice and riser cables, and the severing of hundreds of telecommunication cables installed by CWA contractors at different sites

This conduct had its desired effect. Tel-data contracts that had been awarded to USIS were abruptly cancelled for projects at the Sofitel Hotel, the NBC Experience Store, and the AT&T Bush Terminal. Another CWA contractor, Blue Diamond, had tel-data contracts cancelled in a similar fashion for projects for About.com at 1440 Broadway and for Qwest Communications at 32 Avenue of the Americas.

Fred Lott, the coordinator and building supervisor at the Sofitel Hotel, testified at length about slowdowns and other disruptions by Local 3 contractor, Five Star, at his construction project. Lott testified specifically that he was threatened by Rodney Graves, an Assistant Superintendent for Five Star and a Local 3 agent, and was told by Graves that Local 3 would make sure the job was not completed if USIS was given the tel-data contract. Lott testified that Graves made direct threats such as that elevator cables might be cut and that Lott would experience "personal problems" if Local 3 did not get the job. (JA-1992–2000, 2044.) Lott testified that he perceived Graves' statement to be a threat rather than a legitimate warning. After USIS was awarded the tel-data contract, lights and power were shut down and Five Star's Local 3 workers refused to work overtime. Graves then conveyed the message to Sofitel's parent company that "no Local 3 contractor would perform the high voltage work until USIS was removed from the job site and replaced by a Local 3 contractor." (JA-2010–11, 2024.)

Another job awarded to USIS for Information Builders, located at 2 Penn Plaza, had been openly coveted by a Local 3 contractor. Cables not yet installed were damaged and approximately 600 cables that had been installed in the ceiling were cut just before the completion date. (JA-1581–91; *see also* JA-2194, 2200–07.) Sometime after the award of the tel-data contract to USIS, but before the cables were cut, an IT consultant on the project received a telephone call from the President of the Local 3 contractor, who told him "if we don't get this work, the guys are going to be very unhappy." (JA 2197–98.) The damage was

determined to be the result of "a well planned and thought out, non-random deliberate attempt to sabotage the project . . . [where] the perpetrators are people who have intimate details about the cable routing and the project." (JA-2563–65.) Other such examples in the record abound.

Despite invariably submitting substantially lower bids, the plaintiffs began losing bids consistently to Local 3 contractors on tel-data contracts due to what customers perceived as "unacceptable scheduling and sabotage risks." (JA-2462). USIS was rejected despite submitting a bid that was more competitive by almost $1 million on a contract for Credit Suisse First Boston. USIS had an established and favorable relationship with Credit Suisse, having previously worked on three separate tel-data projects at major construction projects for it in New York City. The circumstances under which the Local 3 contractor had prevailed were summarized in a July 30, 2000 email from a Credit Suisse official who characterized its choice as the product of "extortion." (JA-2459.)

USIS also lost out on bids for substantial jobs for Shearman & Sterling in Manhattan, despite a similar positive working relationship with the firm. A Shearman & Sterling manager registered his "emphatic opposition" to giving into Local 3's "illegal and extortionate demands," and added that he was "disappointed that [the general contractor] would ever allow themselves to be used as the conduit for such threats and . . . further disappointed [with the unwillingness] to recommend that we stand on principle." (JA-2571.) At another Manhattan project

where the general contractor had expressed his opposition to using a CWA contractor, the customer, Random House, overlooked savings of over $1 million to "buy labor peace."[1] *Id.*

B. Expert Opinion

Plaintiffs' case included the opinion of a respected expert, Dr. Frederick C. Dunbar, a Senior Vice President of National Economic Research Associates specializing in antitrust and financial economics. Dr. Dunbar's reports, after well over a year of exhaustive hearings and briefings, were *Daubert* approved. Dr. Dunbar calculated the significant price differential in bids between CWA and Local 3 contractors and concluded that the conduct under scrutiny forced building owners to pay higher prices. (JA-3051-54, 3061-65). He further opined that the telecommunications market in New York City did not behave like a normal competitive market, and added "[t]his behavior [by Local 3 contractors] would not be sustainable in a competitive market where customers could choose an electrical installation services firm that would not be threatening vandalism or other disruptive behavior." (JA-3037.)

Dr. Dunbar concluded that Local 3, acting in concert with defendant electrical contractors, engaged in anticompetitive conduct to injure competition in the telecommunications installation services market. He

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1. For the sake of brevity, the Petitioners have not catalogued the myriad of other incidents to which they were subjected.

reached his conclusion after examining conventional "plus factors" suggesting the existence of a conspiracy. He examined specifically whether there was parallel behavior, motive and opportunity, the ability to communicate and behavior that was inconsistent with independent action in a competitive market. . . ." Dr. Dunbar based his conclusions on several factors, including: (1) lack of demarcation between Local 3 and the electrical contractors, (2) communication by defendant electrical contractors of Local 3's threats of possible vandalism and unwillingness to work overtime, (3) the failure to discipline workers who refused to work, and (4) the incentive of defendant electrical contractors that rely on Local 3 labor to act in concert with Local 3 to reduce competition from CWA contractors.

The defendants' economic self-interest was examined by Dr. Dunbar from the appropriate perspective of the incentives that exist in a competitive marketplace. According to Dr. Dunbar, if the Local 3 contractors were actually competing for high voltage electrical work on major projects, their natural incentive would be to deliver timely performance by controlling their workers and minimizing labor disruptions. Dr. Dunbar observed from the extensive record that the defendant contractors never disciplined workers engaged in misconduct, but rather, continued to employ the same core group of workers. This occurred, he noted, despite the contractors' ability to demand overtime on high voltage electrical projects and to enforce discipline by replacing malefactors with readily available labor from the "union hall."

In addition to the Local 3 contractors' failure to discipline or control workers, Dr. Dunbar noted through countless examples that the contractors actively conveyed threats of vandalism and labor disruptions to customers and did so in a manner suggesting to both the customers and their own workers that the conduct was either condoned or being leveraged by the contractors to obtain tel-data in addition to conventional electrical work.

Dr. Dunbar's reports noted significantly that the contractor's key managers wore two hats—representing the contractor while at the same time, as members of the union, representing the union's interests as well. Dr. Dunbar indicated that this, together with the common infrastructure shared by Local 3, the contractors, and institutions such as the Joint Industry Board that are comprised of representatives from electrical contractors and the union, present ideal circumstances for the formation of a cartel and collective anticompetitive undertakings through tacit or informal rather than express agreements. He concluded that this shared infrastructure was an ideal vehicle for facilitating clandestine inter-firm communications and policing agreements or common understandings.

II. PROCEEDINGS BELOW

This action was brought on June 27, 2000. The defendants moved for summary judgment under the labor antitrust exemptions and under *Matsushita*.

The motion was referred to a Magistrate Judge. The defendants' claim to the non-statutory

labor exemption was rejected as "utterly lacking in merit." The Magistrate, nonetheless, recommended summary judgment. His opinion was founded on the fundamental premise that defendants' proffered explanation for their challenged conduct placed a burden on plaintiffs under *Matsushita* to present "direct evidence" of a conspiracy or an agreement among the defendants. Each piece or category of evidence comprising plaintiffs' case, and from which it was acknowledged a conspiracy reasonably could be inferred, was rejected on the grounds that competing inferences could be drawn from the evidence favorable to the defense. The standard was one in which evidence had to either exclude the possibility of independent action or be disregarded in the overall judicial assessment of the sufficiency of evidence.

That concerted action between Local 3 and its contractors which could reasonably be inferred from the uniformity of the defendants' threats to customers and general contractors following the noted meeting, was not appreciated by the Magistrate. Dr. Dunbar's opinions, which had survived consecutive *Daubert* attacks, were not even mentioned. Evidence that threats conveyed by contractors were perceived as such by customers and others to whom they were directed, and were considered to have come from the contractors as well as the union, were also discounted by the Magistrate.

The Magistrate cited the lack of direct evidence that the customers' perceptions or "state of mind" arose as a result of actions of anyone other than Local 3, even though malign intent could easily be inferred from the content of the statements themselves as well

as from the manner and context in which they were delivered.

The Magistrate went so far as to hold that the conveyance of "warnings" or perceived threats by the defendant contractors was in their economic self-interest, as they "stood to benefit directly, because such 'warnings' increased the chances that it would be awarded telecommunications contracts." App. C 48a–49a. The court appeared to concede the inherent unfairness of the defense, without appreciating its fundamental inconsistency with the objectives of the antitrust laws. The Magistrate concluded, based on a piecemeal review of the evidence, that plaintiffs' conspiracy allegations and defendants' claim to independent action were "equally plausible." App. C 49a. The Magistrate's opinion was adopted uncritically by the district court and affirmed by the Second Circuit. A petition for *en banc* review was denied. App 4a.

REASONS FOR GRANTING THE PETITION

I. THE PROPER MEANING OF *KODAK* AND *MATSUSHITA*

In *Kodak*, this Court emphasized that *Matsushita* had not imposed a special burden on antitrust plaintiffs facing summary judgment; it had merely applied a familiar standard of reasonableness to the inferences that are permissible in a case comprised of an implausible economic theory and parallel conduct that was facially pro-competitive:

> Because the defendants had every incentive not to engage in the alleged conduct . . . the Court found an "absence of any motive to conspire." In that context, the Court determined that the plaintiff's theory of predatory pricing was . . . "speculative," and was "not reasonable." Accordingly, the Court held . . . that summary judgment would be appropriate [unless the plaintiffs] came forward with more persuasive evidence to support their theory.
>
> The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy, . . . it is entitled to summary judgment. *Matsushita* demands only that the non-moving party's inferences be reasonable in order to reach a jury, a requirement that was not invented, but merely articulated, in that decision.

504 U.S. at 468.

The Court in *Kodak* made it clear that the defendants in *Matsushita* were afforded a legal presumption in favor of summary judgment because of the likelihood that permitting inferences of

concerted action would "deter or penalize" pro-competitive behavior:

> Plaintiffs in *Matsushita* attempted to prove the antitrust conspiracy "through evidence of rebates and other price-cutting activities." Because cutting prices to increase business is "the very essence of competition," the Court was concerned that mistaken inferences would be "especially costly" and would "chill the very conduct the antitrust laws were designed to protect. . . ."

Id. at 478.

Conversely, the Court denied Kodak the same legal presumption because it determined *Matsushita*'s deterrence concerns were not implicated by a challenged policy it found facially anticompetitive and "exactly the harm the antitrust laws aim to prevent":

> Nor are we persuaded by Kodak's contention that it is entitled to a legal presumption on the lack of market power because, as in *Matsushita*, there is a significant risk of determining procompetitive conduct . . . the facts in this case are just the opposite. The alleged conduct-higher service prices and market foreclosure – is facially anticompetitive and exactly the harm that antitrust laws aim to prevent. In this case, *Matsushita* does not create

> any presumption in favor of summary judgment for the defendant.

Id.

The facially anticompetitive nature of the challenged conduct was held in *Kodak* to be dispositive grounds for the denial of summary judgment. *Id.* at 479. The Court formulated a presumption against summary judgment and placing any limits on otherwise permissible inferences where there is no significant likelihood of punishing or deterring pro-competitive conduct. *Id.* at 478. The Court stated that in weighing "the risk of deterring procompetitive behavior by proceeding to trial against the risk that the illegal behavior will go unpunished, the balance tips" in favor of summary judgment only when the challenged conduct "appears always or almost always to enhance competition." *Id.*

The balance between deterrence concerns and "the desire that illegal conspiracies be identified and punished," was found to be "unusually one-sided" in favor of summary judgment in *Matsushita.* 475 U.S. at 594. This was due substantially to the inherently pro-competitive and socially beneficial nature of the defendants' challenged price cutting and rebate activities. Referring to price cutting as "the very essence of competition," the Court in *Matsushita* observed that mistaken inferences in predatory pricing cases were especially costly "because they chill the very conduct the antitrust laws are designed to protect." *Id.* (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

The implausibility of the plaintiffs' predatory pricing theory played an equally significant role in *Matsushita*. The Court cited a consensus of authoritative commentary for the proposition that predatory pricing conspiracies are by nature speculative, and thus "rarely tried, and even more rarely successful." *Id.* at 589. The Court went on to consider the "incalculably" greater difficulty of a large number of firms executing such a conspiracy over a prolonged period spanning two decades. *Id.* at 590. The Court concluded that the defendants had "no motive" to enter into the alleged conspiracy, and "every incentive" not to engage in the alleged below cost pricing because its likely effect would be to generate losses with no corresponding gains. *Id.* at 595.

The requirement that plaintiffs must present evidence "that tends to exclude the possibility that the alleged conspirators acted independently" was thus introduced in *Matsushita*, not only in connection with challenged conduct which always or almost always appears to enhance competition, but in an overwhelmingly one-sided case. *Id.* at 601 n.1 (quoting *Monsanto*, 465 U.S. at 764). Direct evidence was necessary to make the inference of conspiracy reasonable in light of competing inferences of independent action arising from the alleged conspiracy's factual and theoretical implausibility.

It was in this context that the Court in *Matsushita* linked the "tends to exclude" standard to settled precepts of summary judgment jurisprudence. *Id.* at 588. Alluding to authorities on such basic Rule 56 requirements as the need for "specific facts" and

showing a "genuine issue for trial," the Court in *Matsushita* explained that if in its factual context the plaintiff's case "simply makes no economic sense," more persuasive evidence is required to support the claim than would otherwise be necessary. *Matsushita*, 475 U.S. at 587. Therefore, properly understood, *Matsushita* and *Kodak* are not only capable of being reconciled, but also harmonized with conventional summary judgment standards. The requirement for direct rather than circumstantial evidence that "tends to exclude" the possibility of independent action, is required only when deterrence concerns are implicated by the factual setting or when the case is factually or theoretically implausible.

II. THE LONG-STANDING CONFLICT AMONG THE CIRCUITS

A. Leading Decisions Espousing the Proper View

Had the courts below properly focused on the core concerns of plausibility and deterrence and applied a conventional summary judgment standard, the lower court decisions in this case would have been different. The denial of defendants' motion for summary judgment would have been compelled under applications of *Matsushita* and *Kodak* prevailing in the Third and Seventh Circuits, under respected precedent formerly prevailing in the Ninth Circuit, and under prominent decisions of panels in the Tenth and Eleventh Circuits and elsewhere.

i. Seventh Circuit

In one of the most recent and influential decisions adhering to the proper view of *Kodak* and *Matsushita*, Judge Posner, in *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 655 (7th Cir. 2002), found the requirement for additional evidence of conspiracy under the "tends to exclude" standard to be tied closely to the plausibility of the charge of collusion. He interpreted *Matsushita* to prescribe a sliding scale approach under which "[m]ore evidence is required the less plausible the charge of collusive conduct." *Id.* at 661. Based on the inherent plausibility of a "garden-variety price-fixing conspiracy," Judge Posner reversed summary judgment holding that the trial court had erred both in reading a heightened burden into the "tends to exclude" standard and in rejecting individual pieces of evidence on grounds of ambiguity. *Id.*

Judge Posner specifically noted that direct evidence of an agreement between the defendants was unnecessary and that a case comprised exclusively of circumstantial evidence in which the existence of an agreement is reasonably inferred is sufficient to defeat summary judgment. *Id.* at 634. This point was underscored by Judge Posner's warning about the "traps" to be avoided by district courts "in evaluating evidence of an antitrust conspiracy." *Id.* at 655. He identified the first "trap" as "weigh[ing] conflicting evidence," which he described as "the job of the jury." *Id.* The second "trap," he said, "is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment." *Id.* Judge

Posner indicated that courts falling into either "trap" supplant the role of a jury:

> It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. Otherwise what need would there ever be for a trial?

Id. at 655–66.

In *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 778–79 (7th Cir. 1999), Judge Posner similarly described *Matsushita* as "teach[ing] that an antitrust claim which makes no economic sense can on that ground be dismissed on summary judgment" and held that even if there was "an innocent explanation for" the defendant's conduct, the issue on summary judgment was "whether a rational jury . . . could conclude (construing the evidence as favorably to the plaintiff as the record permits) that the reason for the [defendant's acts] . . . was that they were [conspiring]." *Id.* at 777–78. In *JTC Petroleum*, circumstantial evidence was found to support the defendants' inherent motive to enlist a captive market of suppliers to assist in enforcing a cartel by punishing mavericks through either coercion or economic inducement.

In another case, *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 614 (7th Cir. 1997) ("*Brand I*"), Judge Posner explained in reversing summary judgment that it does

not matter whether the evidence of conspiracy was "susceptible of an innocent interpretation," only whether there was sufficient evidence in the record. The Court observed that while the defendants' interpretations may be correct, they are not inevitable. *Id.*

In a later case by the same name, *In re Brand Name Prescription Drugs Litigation*, 186 F.3d 781, 785 (7th Cir. 1999) ("*Brand II*"), the Seventh Circuit indicated that parallel oligopoly pricing could be proven to be the result of concerted rather than independent conduct through either direct or circumstantial evidence.

ii. Third Circuit

The Third Circuit has long applied a "sliding scale" to the sufficiency of evidence which is gauged in accordance with the presence or absence of both plausibility and deterrence concerns as defined in *Matsushita* and *Kodak*. The approach was articulated succinctly in *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993), wherein the court instructed that "the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiff's theory and the dangers associated with such inferences." *Id.* at 1232 (internal citations omitted). The court in *Petruzzi's* expressly identified plausibility and deterrence concerns as the two principal factors underlying *Matsushita*. *Id.* Citing *Kodak*, the court emphasized that *Matsushita* "did not hold that an antitrust defendant is entitled to summary judgment merely by providing *an* economic

theory to justify its behavior," but simply stressed that to survive summary judgment in the absence of direct or strong circumstantial evidence of an agreement, a plaintiff must assert a theory that is plausible. *Id.* at 1231. The court also reaffirmed that "'[a] non-movant's burden in defending against summary judgment in an antitrust case is no different than in any other case.'" *Id.* at 1229 (internal citation omitted).

As distinct from *Matsushita*, plaintiff's theory in *Petruzzi's* was not implausible and "the defendants' challenged activities [were] not pro-competitive." *Id.* at 1232. Accordingly, the court stated "more liberal inferences from the evidence should be permitted than in *Matsushita* because the attendant dangers from drawing [such] inferences . . . [were] not present." *Id.* The need for "sufficiently unambiguous" evidence that the defendants conspired in *Matsushita* was attributed to the "absence of a plausible theory of conspiracy." *Id.* at 1233. The *Petruzzi's* court went on to distinguish "sufficiently unambiguous evidence" from "direct evidence," noting significantly with regard to the latter, "the strictures of *Matsushita* [do] not apply," because both are "sufficiently unambiguous." *Id.* This point was underscored by the *Petruzzi's* court's observation that where such concerns are minimal or non-existent, a sufficiently unambiguous and even "compelling" case could be made from the totality of individual pieces of evidence which are ambiguous when viewed in isolation.

In decisions since *Petruzzi's*, the Third Circuit has applied a consistent standard under *Kodak* and *Matsushita* that imposes a higher burden on a

plaintiff opposing summary judgment under the "tends to exclude" standard only where plaintiff's theory is implausible and challenges pro-competitive activities. *See, e.g., Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1001 (3d Cir. 1994); *Advo, Inc. v. Phila. Newspapers, Inc.*, 51 F.3d 1191, 1196–97, 1205 (3d Cir. 1995); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466–67 (3d Cir. 1998); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999). These principles were reaffirmed by the Third Circuit more recently in *In re Flat Glass Antitrust Litigation*, 385 F.3d 350 (3d Cir. 2004).

iii. Ninth Circuit

Similar principles were earlier espoused by the Ninth Circuit in *In re Coordinated Pre Trial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990). Although abrogated by the Ninth Circuit's decision in *In re Citric Acid Litigation*, 191 F.3d 1090 (9th Cir. 1999), *Petroleum* is a thoughtful decision which is often cited and remains highly respected and influential. Under *Petroleum*, "the key to the proper interpretation of *Matsushita* lies in the Court's emphasis on the dangers of permitting inferences from certain types of ambiguous evidence . . . [and the] 'inferences' possible anti-competitive side-effects." *Petroleum*, 906 F.2d at 439.

Petroleum expressly rejected the notion that summary judgment should be granted "whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are *equally plausible*."

Id. at 438 (emphasis added). The Ninth Circuit reasoned that permitting a court to make that decision "would lead to a dramatic encroachment upon the province of a jury":

> To read *Matsushita* as requiring judges to ask whether the circumstantial evidence is more "consistent" with the defendants' theory than with the plaintiff's theory would imply that the jury should be permitted to choose an inference of conspiracy *only* if the judge has first decided that he would himself draw that inference. This approach would essentially convert the judge into a thirteenth juror, who must be persuaded before an antitrust violation may be found.
>
> * * *
>
> Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct. Such an approach would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust conspiracy case. After all, circumstantial evidence is nearly always evidence that

> is plausibly consistent with competing inferences.

Id. at 438.

iv. Other Federal Courts

In *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 572 (11th Cir. 1998), the Eleventh Circuit held that "for all the inadequacies of the record," there was sufficient evidence to proceed to trial in an alleged price-fixing conspiracy that was supported entirely by circumstantial evidence. In *In re Vitamins Antitrust Litigation*, 320 F. Supp. 2d 1, 13 (D.D.C. 2004), the "sliding scale" approach to the sufficiency of circumstantial evidence was expressly adopted by the District Court for the District of Columbia. Under *Vitamins*, the proper reading of *Matsushita* is that if the alleged "conspiratorial actions" do not merit a presumption of pro-competitive conduct, the "[p]laintiffs are entitled to the benefit of a jury determining inferences rather than the Court doing so at the summary judgment stage." *Id.* at 23; *see also Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1082 (10th Cir. 2006).

B. The Mistaken View of Other Circuits

The sharp split among the Circuits as to the meaning and application of *Kodak* is reflected in the contrast between the prevailing interpretations in the Third, Seventh, Eleventh Circuits and others. Many courts have failed to reconcile *Kodak* and *Matsushita*, or to apply a unified understanding of the decisions. There is a general tendency among some jurisdictions

to rely on one or the other to justify either the granting (*Matsushita*) or denial (*Kodak*) of summary judgment. The varying approaches range from the purely *ad hoc*, to those which appear calculated to encroach upon the province of the jury.

The most extreme examples of the latter are the Fourth and Eighth Circuits. Both have endorsed a summary judgment standard that involves weighing circumstantial evidence and construing competing inferences in the defendant's favor. *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, No. 98–2847, 1999 U.S. App. LEXIS 21487, at *21–22 (4th Cir. Sept. 7, 1999); *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Techs, Inc.*, 123 F.3d 1107, 1109 (8th Cir. 1997); *Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995); *Lovett v. General Motors Corp.*, 998 F.2d 575, 579 (8th Cir. 1993).

The Eighth Circuit has been criticized specifically for its *en banc* decision in *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir. 2000). By a bare 6-5 majority, the Eighth Circuit overruled the panel in an oligopoly price-fixing case where there was strong circumstantial evidence of a conspiracy. The Sixth Circuit has similarly imposed on plaintiffs the burden of disproving the non-conspiratorial explanation. *See Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733, 739 (6th Cir. 1999).

There are also splits even within circuits, typified by the Ninth Circuit's abrogation of *Petroleum*, in *Citric Acid*, and Eleventh Circuit

decisions in *Harcros*, and *Williamson Oil Co., Inc. v. Phillip Morris, USA*, 346 F.3d 1287 (11th Cir. 2003), which are difficult to reconcile. Although the Second Circuit has subscribed to the broader view of *Matsushita* in this case and others, *Apex Oil Co. v. DiMauro*, 822 F.2d 246 (2d Cir. 1987), holds that the weight assigned to competing inferences remains within the province of a jury, notes that circumstantial evidence is sufficient where, as here, there are traditional "plus factors" and reaffirms the conventional summary judgment standard and the notion that conspiracy evidence must be examined as a whole and not in isolation.

The need for Supreme Court review to resolve the uncertainty is illustrated by the number of petitions presented on both sides of the *Matsushita* issue. They include petitions in *Alvord-Polk*, *High Fructose Corn Syrup*, *Flat Glass*, *Petroleum*, *Citric Acid*, *Blomkest*, and *SMS Systems Maintenance Services, Inc. v. Digital Equipment Corp.*, 188 F.3d 11 (1st Cir. 1999), among others. Although it is not unusual to allow an issue to mature, this one has had full time to germinate and is now ready for adjudication. This petition presents the Court with the opportunity to insure the uniform administration of justice in cases where *Matsushita*'s core concerns are not implicated in a factual and legal setting which could not be more remote from those considerations.

III. THE IMPROPER STANDARD APPLIED BELOW

This petition is distinguishable from virtually all others involving *Matsushita*'s application in parallel conduct cases. Unlike all other cases involving a disputed application of *Matsushita*, the fact-finder in this case would be presented with a choice of competing explanations which would both involve unlawful and facially anticompetitive overt conduct. Moreover, because of their close association with the direct perpetrators, and intimate relationships with each other, the defendants would be implicated in the unlawful conduct regardless of the verdict. A trial on the merits would feature a seemingly unprecedented defense which would have the principal competitive and economic beneficiaries of facially anticompetitive conduct claiming that it was in their self interest and thus permissible for them to both tolerate and engage in actions which advanced the objectives of the conduct on the grounds that members and employees under their supervision who were directly involved were beyond their control.

If the Court's decision in *Kodak* is to have any meaning and application in Section 1 cases, then this surely presents an instance where, given its factual setting, the legal presumption on motion for summary judgment should have been in favor of plaintiffs. The alleged conspiracy in this case obviously is plausible from the perspective of common experience and the legal and historical record. The balance of the "risk of deterring pro-competitive behavior" and the "risk that unlawful behavior will go unpunished" completely and dramatically favors plaintiffs. 504 U.S. at 479. The

challenged conduct is without social value, and is indefensible from the standpoint of competition. The possibility of mistaken inferences thus poses no concern for the objectives of the antitrust laws.

Conversely, allowing the unlawful and egregious criminal conduct to go unpunished will result in the entrenchment of an anticompetitive market structure and the perpetuation of artificially inflated prices. An "incorrigible" and "recidivist" union, moreover, will remain free to pursue and realize its goal of achieving exclusive dominion over commerce beyond its trade jurisdiction in defiance of federal authority. In a case involving allegations which the trial court acknowledged were plausible, and where deterrence considerations so decisively favor the plaintiffs, the focus below under *Kodak* should have been on the sufficiency of plaintiffs' evidence and the reasonableness of their sought after inferences under conventional Rule 56 standards.

A. The Petition Should be Granted to Prevent Further Encroachment by Federal Courts on the Province of a Jury and the Erosion of Fundamental Precepts of Summary Judgment Jurisprudence

Had a conventional approach to summary judgment been taken, this case undoubtedly would have been permitted to proceed to trial. Plaintiffs were found to have presented substantial evidence from which reasonable inferences supporting a conspiracy could be drawn. The trial court determined that plaintiffs presented substantial evidence of a

conspiracy which would be sufficient to proceed to trial had it not felt constrained to limit otherwise permissible inferences. App. C 51. This alone should have been enough to sustain plaintiffs' case under the appropriate "sliding scale" standard, given the broad range of inferences the absence of deterrence and plausibility concerns should have entitled the plaintiffs.

Nevertheless, the finding of evidential equality itself rested on an equally flawed legal premise. Falling simultaneously into two of Judge Posner's proverbial "traps," the trial court not only weighed evidence in isolation but did so based on an improper supposition that if a piece or category of evidence did not point unequivocally to conspiracy, then it was deemed to be of "equal" probative weight and discarded. There was no attempt to assess evidence in relationship to other evidence and the balance of plaintiffs' case, or to examine and weigh the reasonableness and probative value of competing inferences from even the isolated perspective of this fragmented approach.

Thus, the trial court not only supplanted the fact-finding role of the jury, but substituted a methodology for fact-finding which is inherently inferior to the norms observed by juries. The piecemeal examination of conspiracy evidence was categorically rejected by the Court nearly 50 years ago in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), wherein the Court stated:

> [P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . The character and effect of a conspiracy are not to be judged by dismembering it and viewing it as separate parts, but only by looking at it as a whole.

Id.

The correct standard for summary judgment is not one in which the evidence of parallel conduct or conspiracy is "susceptible [to] an innocent interpretation"; it is "whether there is sufficient evidence of [collusion] to create a jury issue. . . ." *Brand I*, 123 F.3d at 614; *see also Petruzzi's*, 998 F.2d at 1230 (holding that plaintiff need not match, item for item, each piece of evidence proffered by the movant but simply must exceed the mere scintilla standard); *Flat Glass*, 385 F.3d at 368 (rejecting defendant's proposal to conduct a piecemeal examination of evidence, disregarding the pieces that could feasibly be interpreted as consistent with the absence of an agreement); *Harcros*, 158 F.3d at 548.

Interpretations of the "tends to exclude" standard such as applied below have been described by leading commentators as effectively requiring antitrust plaintiffs to disprove the defendant's case. Judge Posner has observed that "[i]t is unusual to require a plaintiff as part of his burden of proof to prove a sweeping negative." RICHARD A. POSNER, ANTITRUST LAW, 100 (2d ed. 2001). He has

characterized the effect of having to exclude the possibility of independent action as higher than the criminal standard of proof:

> That would imply that the plaintiff in an antitrust case must prove a violation of the antitrust laws not by a preponderance of the evidence, not even by proof beyond a reasonable doubt (as indeed is required in criminal antitrust cases), but to a 100 percent certainty, since any lesser degree of certitude would leave a possibility that the defendant was innocent.

Brand II, 186 F.3d at 787.

B. The Petition Should be Granted to Clarify The Meaning of *Matsushita* in a Novel Legal Setting and Prevent The Decision From Being Construed To Encourage and Condone Illegal and Anticompetitive Behavior

The courts below not only failed to calibrate the range of permissible inferences in accordance with the lack of plausibility and deterrence concerns; they failed to account in any way for the meaningful distinctions between plaintiffs' particular antitrust claims and the oligopoly price-fixing cases from which a requirement for direct evidence appears to have been borrowed. As the Third Circuit observed in *Flat Glass*, the caution of courts subscribing to the broader view of *Matsushita* in accepting inferences from circumstantial evidence has evolved largely in

oligopoly price–fixing cases due to the economic theory of interdependence espoused in the scholarship of noted academic Donald Turner. *Flat Glass*, 385 F.3d at 360 (internal citations omitted). According to some, a distinction requiring greater circumspection in oligopoly price–fixing cases is that the two "plus factors" generally considered to be the most persuasive evidence of conspiracy—motive to conspire and acts against self-interest—are often indications of nothing more than interdependence. *Id.* (citing POSNER, ANTITRUST LAW at 100).

It was with respect to this view, and the development of the "tends to exclude" standard in oligopoly price-fixing cases, that Judge Posner offered the following criticism:

> Most courts mistakenly regard tacitly collusive behavior as independent and therefore infer from the dictum in *Monsanto* that the plaintiff must negate the possibility that supra-competitive pricing was achieved without explicit agreement. This produces the paradox that the more conducive the market's structure is to collusion without express communication, the weaker the plaintiffs' case.

POSNER, ANTITRUST LAW at 99–100.

Judge Posner's comments reflect an emerging view that under a proper reading of *Kodak* and *Matsushita*, evidence of oligopoly parallel pricing, combined with a market structure conducive to

collusion, should be enough to defeat summary judgment. This view is founded not only on skepticism of "interdependence" as a dated economic theory, but on the grounds that parallel pricing, even when engaged in benignly, is "socially useless behavior" with no possible pro-competitive benefits. Professor Hovenkamp has explained that "[c]ourts should also be less reluctant to condemn a business practice that has no obvious social . . . benefits" because there is no danger that a false positive is going to discourage socially useful conduct. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 136 (2005).

The courts below should have freshly examined these criticisms in relation to the distinct and peculiar nature of plaintiffs' claims. Apart from challenging unquestionably malign and socially useless behavior, the conspiracy alleged by plaintiffs is not remotely comparable to oligopoly parallel pricing. Plaintiffs allege a conspiracy which more directly resembles an illegal group boycott, or concerted refusal to deal, such as in *JTC Petroleum* and *Champagne Metals*, with the added dimension of union coercion and an attempt at market dominance analogous respectively to *Allen Bradley*, *MCM Partners*, *Altemose Constr. Co.*, and *C&W Constr. Co.*

In group boycott cases, conventional pre-*Matsushita* "plus factor" evidence such as "motive to conspire," "market conduciveness," and—when viewed from the proper perspective of a presumed competitive market—actions against self-interest, have been held to sustain a claim to trial. *Champagne*, 458 F.3d at 1085; *JTC Petroleum*, 190 F.3d at 778–79.

In the union coercion cases, the focus has been on either the relationship between coercive acts and interference with a competitor's targeted contractual and business relationships, or the effect on the marketplace of agreements or commercial understandings between the union and its contractors, and possible other third parties.

In *Champagne Metals*, circumstantial evidence was deemed sufficient to proceed to trial largely because the alleged conduct was facially anticompetitive and the defendants had an economically rational motive to keep aggressive competitors out of the marketplace. 485 F.3d at 1086 (internal citation omitted). Similarly, in *JTC Petroleum*, a market structure conducive to collusion and the inherent motive of established firms to exclude upstart competitors, were sufficient to defeat summary judgment.

As noted, relevant and admissible "plus factor" evidence was submitted by plaintiffs in this case through their expert, Dr. Dunbar. Dr. Dunbar presented persuasive opinion evidence that the parochial and union-dominated relevant market was conducive to collusion, and that the defendants' had a motive to conspire. His reports confirmed that Local 3 was ideally suited to serve as a catalyst for the conspiracy because of the value of its reputation and ability to intimidate. They further indicated that union institutions provided a common professional infrastructure shared by the defendants which both optimized the opportunity for covert or tacit communications and was an effective instrument for enforcing illicit agreements or understandings among

the defendants. The reports attested to the defendants' self-evident motive to collude in order to thwart competition from CWA contractors. They concluded that the defendants' conduct could only be explained in terms of collusion or their complicity with an anti-competitive environment which they have contributed to and consciously exploited.

The unwillingness of the courts below to address Dr. Dunbar's reports despite finding them competent and admissible, can only be attributed to misguided deference to the labor antitrust exemptions. Once it was determined that defendants' challenged conduct was beyond the exemptions, reasonable inferences arising from the reality of the interconnectivity between Local 3 and its various signatory contractors should have been more freely permitted. Inferences flowing from Local 3's adjudicated history of its relentless pursuit of exclusive dominion over the tel-data market through illegal secondary boycott activity should have been permitted as well.

The courts below also failed to truly appreciate the implications of the defendant contractors' "independent action" defense. The defense rests on a claim to economic self-interest which assumes an anticompetitive environment in which the contractors are complicit. The contractors' behavior is explained purely in terms of dealing with the reality of this environment. According to the narrative, the union and its members cannot be controlled, and any actions by the contractors that normally would be expected in a competitive environment—such as punishing or disciplining workers, or replacing them through other

available union labor—would be met with resistance and ultimately retribution by the union or its members.

Thus, the contractors must not only resign themselves to the misconduct of the union and its membership, they must condition customers, consultants and general contractors comprising the balance of the relevant market to accept and succumb to this reality as well. Especially given that there are great benefits to be gained by the defendant contractors from this conditioning, and their acquiescence to Local 3's coercion, the defendant contractors are not beyond accountability under the antitrust laws.

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

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APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED FEBRUARY 19, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of February, two thousand ten.

PRESENT:

ROBERT D. SACK,
ROBERT A. KATZMANN,
Circuit Judges,
JED S. RAKOFF,*
District Judge.

No. 07-4214-cv

U.S. INFORMATION SYSTEMS, INC., ODYSSEY GROUP INC., and BLUE DIAMOND FIBER OPTIC NETWORKS, INC.,

Plaintiffs-Counter-Defendants-Appellants,

- v -

* The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NUMBER 3, ADCO ELECTRICAL CORPORATION, FIVE STAR ELECTRIC CORPORATION, NEAD INFORMATION SYSTEMS, and HUGH O'KANE ELECTRIC COMPANY LLC,

Defendants-Appellees,

A & R ELECTRICAL, MAINTENANCE, INC., FOREST ELECTRIC CORPORATION, and IPC COMMUNICATIONS, INC.,

Defendants,

A R COMMUNICATIONS CONTRACTORS INC.,

Counter-Claimant-Appellee.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

Plaintiffs-Counter-Defendants-Appellants U.S. Information Systems, Inc., Odyssey Group Inc., and Blue Diamond Fiber Optic Networks, Inc. appeal from the order and judgment of the United States District Court for the Southern District of New York adopting the Report and Recommendation of United States

Magistrate Judge James C. Francis IV and granting summary judgment to defendants-appellees International Brotherhood of Electrical Workers Local Union Number 3 ("Local 3") and various contractors who employ Local 3 workers on the appellants' claim under section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and dismissing the appellants' related state law claims without prejudice.

On appeal, the appellants argue that the district court erred by (1) applying an incorrect summary judgment standard, (2) ignoring testimony of the appellants' expert, (3) improperly drawing inferences in favor of the appellees, and (4) failing to consider certain evidence the appellants submitted. We assume the parties' familiarity with the factual and procedural history of the case.

"We review de novo a district court's grant of summary judgment." *Coan v. Kaufman*, 457 F.3d 250, 254 (2d Cir. 2006). "[C]onstruing the evidence in the light most favorable to the nonmoving party," *Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003), we may affirm only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2).

Here, the district court articulated the correct summary judgment standard when it said that "'[t]o survive a motion for summary judgment . . . , a plaintiff

seeking damages for a violation of § 1 [of the Sherman Act] must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.'" *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3*, No. 00 Civ. 4763 (RMB)(JCF), 2007 WL 2746902, at *2, 2007 U.S. Dist. LEXIS 69760, at *8 (S.D.N.Y. Sept. 18, 2007) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)) (alterations in *U.S. Info. Sys.*). The appellants argue that the Supreme Court altered this standard in *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992), by stating that "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury," *id.* at 468. We disagree. This language explains the *Matsushita* standard. It does not alter it. This view is supported by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), where the Supreme Court cited *Matsushita* for the proposition that "at the summary judgment stage a [Sherman Act] § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently," *id.* at 554.

Here, the district court properly granted summary judgment to the appellees after concluding that "it is equally plausible that [the non-Local 3 appellees] acted in their own self-interest independent of Local 3 and of one another." *U.S. Info. Sys., Inc.*, 2007 WL 2746902, at *2, 2007 U.S. Dist. LEXIS 69760, at *8 (internal quotation marks omitted).

We conclude that the appellants' other arguments are without merit. The district court considered and rejected the views of the appellants' expert. And we find no instances in which the district court drew inferences in favor of the appellees or ignored evidence that would merit the denial of summary judgment to them under the *Matsushita* standard.

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of the Court

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 18, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

00 Civ. 4763 (RMB)(JCF)

U.S. INFORMATION SYSTEMS, INC., ODYSSEY GROUP, INC., and BLUE DIAMOND FIBER OPTIC NETWORKS, INC.,

Plaintiffs,

-against-

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NUMBER 3, AFL-CIO, A R COMMUNICATION CONTRACTORS, INC., ADCO ELECTRICAL CORP., FIVE STAR ELECTRIC CORP., FOREST ELECTRIC CORP., HUGH O'KANE ELECTRIC COMPANY LLC, IPC COMMUNICATIONS, INC., and NEAD INFORMATION SYSTEMS,

Defendants.

Appendix B

DECISION AND ORDER

I. Background

On or about February 25, 2002, U.S. Information Systems, Inc., Odyssey Group, Inc., and Blue Diamond Fiber Optic Networks, Inc., (collectively, "Plaintiffs") filed a Second Complaint against Local Union Number 3 ("Local 3") of the International Brotherhood of Electrical Workers, AFL-CIO and several electrical contractors that employ Local 3 members (collectively, "Defendants"), alleging that Defendants "have combined and conspired with each other . . . to carry out a common plan [including engaging in work stoppages and vandalism] to coerce and induce building owners and tenants, building managers, general contractors, information technology consultants, and other in the construction industry to exclude [Plaintiffs] from the market for telecommunications installation work" in violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (2000), and the New York State Donnelly Act, N.Y. Gen. Bus. Law § 340 (McKinney 1999). (2d Compl. ¶¶ 1, 36, 41.)

On or about February 16, 2007, Defendants jointly moved "for an order of summary judgment, pursuant to Federal Rule of Civil Procedure 56, on all claims asserted by Plaintiffs against Defendants." (Defs.' Notice of Mot. for Summ. J. at 1-2.) Defendants argue, among other things, that "[t]here is no evidence of an actual agreement, no testimony concerning entry into or enforcement of the alleged agreement, no evidence

regarding discussion of or meetings about such an agreement, no evidence of ongoing efforts to monitor the agreement, and no testimony regarding who agreed to join or when." (Joint Mem. of Law in Supp. of Defs.' Mot. for Summ. J., dated Feb. 16, 2007 ("Joint Mem.") at 23.) Defendants claim that the conduct complained of amounted to "nothing more than a very few isolated instances of allegedly inappropriate behavior by a few individuals" (Joint Mem. at 15), and it was not "directed, authorized or ratified by the union." (Mem. of Law on Behalf of Local 3 in Supp. of the Mot. for Summ. J., dated Feb. 16, 2007, at 4.)

On August 3, 2007, United States Magistrate Judge James C. Francis IV, to whom this matter had been referred, issued a comprehensive and thoughtful Report and Recommendation ("Report") recommending that Defendants' summary judgment motion be granted because, among other reasons, Plaintiffs "have offered no evidence to support their claims that [Defendants] were part of a conspiracy." (Report at 30.) "[T]o survive a motion for summary judgment, it is 'critical' that the plaintiff make a threshold showing that 'a reasonable jury could find that the defendants' actions were concerted rather than independent.'" (Report at 24 (quoting *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 233 (2d Cir. 1999)).) "It is not clear that the employees who [allegedly may have engaged in a conspiracy] acted with the knowledge or approval of their employers." (Report at 32.) And, "[e]ven assuming that the defendant contractors endorsed or condoned [employees' alleged behavior] . . . it is entirely plausible

that they did so in the absence of any agreement with Local 3 or with one another." (Report at 32.) "Independent action is not proscribed" by Section 1 of the Sherman Act. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984).

The Report advised that "[p]ursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from this date to file written objections to this Report." (Report at 39.)

The parties filed (voluminous) objections and responses (collectively, "Objections") to the Report, including objections by the prevailing parties. On or about August 15, 2007, Plaintiffs filed objections (*see* Pls.' Objections, dated Aug. 13, 2007) accompanied by the Declaration of Maxwell M. Blecher (*see* Blecher Decl., dated Aug. 13, 2007). On or about August 17, 2007, Defendants filed objections to portions of the Report. (*See* Defs.' Objections, dated Aug. 16, 2007). On or about August 31, 2007, Defendants filed a response to Plaintiffs' objections, (*see* Defs.' Resp. to Pls.' Objections, dated Aug. 31, 2007), and on or about September 4, 2007, Plaintiffs filed a response to Defendants' objections (*see* Pls.' Opp'n to Defs.' Objections, dated Aug. 31, 2007). On or about September 10, 2007, Plaintiffs filed a reply brief in support of their objections. (*See* Pls.' Reply in Supp. of Objections, dated Sept. 6, 2007.)

For the reasons set forth below, the Court adopts the Report in its entirety.

II. Standard of Review

The court "shall make a *de novo* determination of those portions of the report or specified findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C); *see also* Fed. R. Civ. P. 72(b); *Grassia v. Scully*, 892 F.2d 16, 19 (2d Cir. 1989). As to any portions of a magistrate judge's report to which no objections have been made, the district judge may adopt all findings that are not clearly erroneous. *See Thomas v. Arn*, 474 U.S. 140, 149, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

III. Analysis

The facts and procedural history as set forth in the Report are incorporated herein by reference unless otherwise noted. The Court has conducted a *de novo* review of, among other things, the Report, the parties' objections to the Report, the responses to those objections, and applicable legal authorities, and it concludes that Magistrate Judge Francis's legal and factual determinations are supported by the record and the law in all respects. *See Pizarro v. Bartlett*, 776 F. Supp. 815, 817 (S.D.N.Y. 1991). The parties' Objections

provide no basis for departing from the Report's conclusions and recommendations.[1]

Judge Francis concluded correctly that "this Court cannot permit an antitrust case to go to trial where the evidence is 'as consistent with permissible [competition] as with illegal conspiracy.'" (Report at 35-36 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).) "To survive a motion for summary judgment . . . , a plaintiff seeking damages for a violation of § 1 [of the Sherman Act] must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764); *see also AD/SAT*, 181 F.3d at 221 (affirming summary judgment in favor of defendants under the *Matsushita/Monsanto* standard); *Reading Int'l., Inc. v. Oaktree Capital Mgmt. LLC*, No. 03 Civ. 1895, 2007 U.S. Dist. LEXIS 504, 2007 WL 39301, at *7 (S.D.N.Y. Jan. 8, 2007) (Crotty, J.) (same). An individual's participation in a work stoppage or slowdown or declination of "overtime in direct response to Plaintiffs' involvement on a project . . . is a legitimate and independent act to secure and preserve work for themselves." (Joint Mem. at 31.) "If there were proof that a few renegade members of Local 3 acted independently to advance their perceived interests, that conduct would not be attributable to any Defendant, much less prove a . . . conspiracy." (Joint Men. at 30.)

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1. Any Objections not specifically addressed in this Order have been considered *de novo* and rejected.

Judge Francis properly determined that "it is equally plausible that [Defendants] acted in their own self-interest independent of Local 3 and of one another." (Report at 35.)

V. Conclusion and Order

The Court adopts the Report in its entirety, and, for the reasons stated herein and therein, grants Defendants' motion for summary judgment [Dkt. #294]. The Clerk of the Court is respectfully requested to close this case.

Dated: New York, New York
September 18, 2007

s/ RMB
RICHARD M. BERMAN,
U.S.D.J.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED AUGUST 3, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

00 Civ. 4763 (RMB) (JCF)

U.S. INFORMATION SYSTEMS, INC., ODYSSEY GROUP, INC. and BLUE DIAMOND FIBER OPTIC NETWORKS, INC.,

Plaintiffs,

- against -

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NUMBER 3, AFL-CIO, A R COMMUNICATION CONTRACTORS INC., ADCO ELECTRICAL CORPORATION, FIVE STAR ELECTRIC CORPORATION, FOREST ELECTRIC CORPORATION, HUGH O'KANE ELECTRIC COMPANY LLC, IPC COMMUNICATIONS, INC. and NEAD INFORMATION SYSTEMS,

Defendants.

Appendix C

REPORT AND RECOMMENDATION

TO THE HONORABLE RICHARD M. BERMAN, U.S.D.J.:

The plaintiffs in this action are contractors that employ members of the Communication Workers of America, AFL-CIO (the "CWA") to install low-voltage telecommunications and data ("tel-data") wiring for commercial customers in the New York City metropolitan area. The defendants are Local Union Number 3 ("Local 3") of the International Brotherhood of Electrical Workers, AFL-CIO (the "IBEW") and several electrical contractors that employ Local 3 members.[1] The plaintiffs seek damages and injunctive relief, alleging that the defendants conspired to exclude CWA contractors from the tel-data installation market in violation of § 1 of the Sherman Antitrust Act,[2] 15 U.S.C. § 1, and New York State's Donnelly Act, N.Y. Gen. Bus. Law § 340. The plaintiffs have also brought common law claims for tortious interference with contract and prospective business advantage. The defendants have moved for summary judgment on each

1. I will refer to contractors that use Local 3 labor as "Local 3 contractors," and to contractors that use CWA labor as "CWA contractors."

2. The plaintiffs initially asserted claims under both § 1 and § 2 of the Sherman Antitrust Act but have since withdrawn their § 2 claims. *U.S. Info. Sys. v. IBEW Local Union No. 3*, No. 00 Civ. 4763, 2006 U.S. Dist. LEXIS 52870, 2006 WL 2136249, at *1 n.1 (S.D.N.Y. Aug. 1, 2006).

of the plaintiffs' claims.[3] For the reasons set forth below, the defendants' motion should be granted.

Background

A. *Tel-Data and Electrical Installation Markets*

Commercial construction projects in New York City are usually overseen by a general contractor or construction manager, who is hired by the owner to coordinate the process of construction. (Defendants' Joint Statement of Facts About Which There is No Genuine Dispute ("Def. 56.1 Stmt."), ¶ 4; Plaintiffs' Rule 56.1 Counterstatement in Response to Defendants' Rule 56.1 Statement ("Pl. 56.1 Stmt."), ¶ 4). The general contractor then subcontracts specific parts of the job to trade contractors that perform services such as electrical, plumbing, and dry wall installation. Electrical contractors such as the defendants generally employ trained electricians who are members of Local 3 to install high-voltage wiring and equipment. (Def. 56.1 Stmt., ¶ 7; Pl. 56.1 Stmt., ¶ 7).

Commercial construction projects often also require the installation of low-voltage electrical systems, including tel-data, fire alarm, and security systems. (Def. 56.1 Stmt., ¶ 9; Pl. 56.1 Stmt., ¶ 9). Some electrical contractors, including defendants Hugh O'Kane Electric

3. All claims against defendants IPC Communications, Inc. ("IPC") and Forest Electric Corporation have been dismissed by stipulation.

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Company LLC ("Hugh O'Kane"), Five Star Electric Corporation ("Five Star"), and ADCO Electrical Corporation ("ADCO"), also hire members of Local 3 to perform low-voltage installation. (Def. 56.1 Stmt., ¶¶ 13, 174, 215, 349; Pl. 56.1 Stmt., ¶¶ 13, 174, 215, 349). Local 3 electricians who perform low-voltage work are paid the same wage that they make when performing high-voltage work. Low-voltage systems can also be installed by members of the CWA who typically receive lower hourly wages than Local 3 members. (Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pl. Memo.") at 6, 8-9). According to the plaintiffs, this is because

> [t]raditional electrical installation, with its emphasis on high voltage work, requires a variety of skills obtained through many years of training and apprenticeship. Because of training and the safety risks associated with high voltage, Local 3 journeymen electricians command a premium wage. . . . [L]ow voltage workers do not have the same skill levels or face the risks associated with high voltage and accordingly, their compensation is lower. This enables CWA contractors who are not bound by the wage strictures of Local 3 to significantly underbid Local 3 contractors[.]

(Pl. Memo. at 8-9).

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There is a long history of jurisdictional disputes between the CWA and the IBEW, of which Local 3 is a chapter. (Def. 56.1 Stmt., ¶¶ 146-147; Pl. 56.1 Stmt., ¶¶ 146-147). According to Local 3, low-voltage electrical work has historically been the province of the IBEW. Local 3 claims that in recent years the CWA has "challenge[d] the IBEW for this work, often succeeding in obtaining it, ousting the IBEW electricians and performing the work at pay rates that were, and still are, substandard by any relevant criteria."[4] (Affidavit of Thomas Van Arsdale dated Aug. 23, 2005 ("Van Arsdale Aff."), ¶ 19). Although the IBEW and the CWA signed a treaty designed to resolve the dispute between the two unions (Affidavit of Morton Bahr dated March 27, 2007 ("Bahr Aff."), attached as Exh. 33 to Declaration of John E. Andrews dated April 2, 2007 ("Andrews Decl."), ¶ 13; Van Arsdale Aff., ¶ 21), the plaintiffs claim that Local 3 has tried to "exclude non-Local 3 labor" from the industry. (Pl. Memo. at 34-40). This case involves the plaintiffs' claim that Local 3 has enlisted the aid of electrical contractors in an attempt to force CWA contractors out of the telecommunications installation market.

B. *Plaintiffs' Claims*

The plaintiffs contend that Local 3 has conspired with the defendant contractors "to coerce and induce

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4. The plaintiffs, by contrast, contend that "[i]n the early days of telecommunications, installations were done only by the telephone company monopolies utilizing CWA labor." (Pl. Memo. at 8).

building owners and tenants, building managers, general contractors, information technology consultants, and others in the construction industry to exclude the plaintiffs from the market for telecommunications installation work." (Second Complaint dated Feb. 22, 2002 ("Sec. Compl."), ¶ 36). According to the plaintiffs, CWA contractors have been able to capture a substantial portion of the New York low-voltage installation market in recent years by submitting lower bids than Local 3 contractors, in part because, as explained above, their labor costs are lower. (Pl. Memo. at 9). The plaintiffs contend that the defendants, afraid that they would lose tel-data work to lower-priced CWA contractors,

> have resorted to measures that allow them to win bids for low voltage projects without lowering their price, specifically, their tried and true tactic of creating fear among owners, consultants and general contractors that completion deadlines will be missed, sabotage and vandalism will occur and significant costs [will be] incurred if a CWA contractor is awarded the job.

(Pl. Memo. at 7). They assert that the defendants' "key tactic" consists of "threats communicated to potential customers or their agents that Local 3 workers employed by the defendant contractors to do the high voltage electric work would take measures to cause scheduling delays resulting in cost overruns if a non-Local 3 contractor was chosen to perform the

telecommunications work on a particular project." (Pl. Memo. at 1). The plaintiffs also contend that, in some instances, Local 3 members disrupted work when teldata contracts were awarded to CWA contractors and that, as a result, those contracts were rescinded and awarded to Local 3 contractors instead. (Pl. Memo. at 2).

C. *Plaintiffs' Evidence*

1. *A R Communication Contractors Inc.*

Defendant A R Communication Contractors Inc. ("A R") performs only low-voltage telecommunications work. (Def. 56.1 Stmt., P 166; Pl. 56.1 Stmt., ¶ 166). However, it uses Local 3 labor. The plaintiffs have submitted an affidavit from Terence McDonough, the president of plaintiff Odyssey Group, Inc. ("Odyssey"), in which he states that Odyssey bid on "turret installation work" on the "ABN Amro project" at 1290 Avenue of the Americas. (Affidavit of Terence McDonough dated Dec. 8, 2000 ("McDonough Aff."), attached as Exh. 64 to Andrews Decl., ¶ 5). Odyssey submitted the bid to Syntegra, another contractor that had been "awarded the contract for the sale of turret equipment." (McDonough Aff., ¶ 5). Mr. McDonough states that "a Syntegra official informed [him] that a business agent of IBEW Local No. 3 had threatened ABN Amro that the project would not be completed on time unless IBEW Local No. 3 labor was used for all of the telecommunications installation work on the project." (McDonough Aff., ¶ 5). The turret installation work was

then awarded to A R allegedly "because of the 'Local 3 issue.'" (McDonough Aff., ¶ 5).

2. *ADCO*

The only evidence related to defendant ADCO involves the NBC Experience project at 30 Rockefeller Plaza. (Def. 56.1 Stmt., ¶¶ 196-197; Pl. 56.1 Stmt., ¶¶ 196-197). NBC hired plaintiff U.S. Information Systems ("USIS") to do the telecommunications installation work. (Affidavit of Stan Walczak dated April 15, 1999 ("Walczak Aff."), attached as Exh. 56 to Andrews Decl., ¶ 7). USIS began work in February 1999. (Walczak Aff., ¶ 8). At that time, ADCO had already been working on the NBC project for four or five months. (Excerpts of Deposition of Stanley Walczak dated Aug. 2, 2002 ("Walczak Dep."), attached as Exh. 30 to Andrews Decl. and Exh. 47 to Declaration of Kevin J. Toner dated Feb. 16, 2007 ("Toner Decl."), at 32; Walczak Aff., ¶ 4). During those months, ADCO electricians regularly worked overtime as needed to "[s]upport other trades and stay on schedule."[5] (Walczak Dep. at 32; Walczak Aff., ¶ 4).

On February 1, when CWA members arrived on the job site, an ADCO foreman complained to ADCO project manager Tom Conte and to Stan Walczak, a Senior Project Manager in the NBC Facilities Department, that

5. In many cases, construction projects are placed on an accelerated schedule, and contractors must use overtime labor in order to complete the project on time. (Def. 56.1 Stmt., ¶ 8; Pl. 56.1 Stmt., ¶ 8).

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"USIS' employees were performing work that was not within the jurisdiction of the CWA, but rather, within the jurisdiction of Local 3 employees." (Walczak Aff., ¶ 9; Excerpts of Deposition of Thomas Conte, attached as Exh. 20 to Toner Decl., at 95). The foreman allegedly informed Mr. Walczak that "Local 3 employees . . . would not work overtime and would engage in work slowdowns as long as USIS' employees continued performing the telecommunications work in question." (Walczak Aff., ¶ 9). On that day, ADCO electricians worked half an hour before and after the standard workday in order to supply power and light for other tradespeople working at the site, but performed no additional overtime. (Def. 56.1 Stmt., ¶ 198; Pl. 56.1 Stmt., ¶ 198).

On February 2, 1999, ADCO transferred six of the electricians who had refused to perform overtime to another project. (Def. 56.1 Stmt., ¶ 199; Pl. 56.1 Stmt., ¶ 199). Despite this measure, ADCO workers continued to refuse to work overtime; according to the plaintiffs, all of the ADCO electricians left the job site at approximately 3:15 p.m. for the next week to ten days. (Walczak Dep. at 42, 75; Walczak Aff., ¶ 11; Affidavit of Thomas Yuen dated April 9, 1999 ("Yuen Aff."), attached as Exh. 53 to Andrews Decl., ¶ 9). NBC replaced USIS with ADCO for the telecommunications work, and the work slowdowns ceased. (Walczak Aff., ¶¶ 12, 14; Letter of Frank Lazzaro dated Feb. 18, 1999, attached as Exh. 57 to Andrews Decl.). ADCO did not directly request that NBC terminate the USIS contract; NBC did so because ADCO employees' refusal to work overtime jeopardized the construction schedule. (Walczak Dep.

at 79, 99, 100). ADCO agreed to "do the balance of the work for the same price as USIS." (Walczak Dep. at 45-46, 82; E-mail of Stan Walczak dated Feb. 8, 1999, attached as Exh. 55 to Andrews Decl.).

3. *Five Star*

The evidence against Five Star involves the Hotel Sofitel project. After USIS was awarded the telecommunications installation contract on the project, Five Star employees allegedly shut down elevators and refused to supply power to the construction site on a number of occasions, apparently at the direction of Howie Tensor, the Five Star foreman. (Excerpts of Deposition of Fred Lott ("Lott Dep."), attached as Exh. 15 to Andrews Decl., at 105, 109-11, 117-19, 171). In addition, Five Star's electricians refused to work overtime.[6] (Lott Dep. at 139). Fred Lott, construction manager for the building owner, testified that Mr. Tensor told him that Robert King, the Five Star project manager, had directed him not to supply power or bring workers to the job site until the issue with USIS had been resolved. (Lott Dep. at 104-08). However, Mr. Lott also testified that other representatives of Five Star told him that the problem was that Local 3 had refused to provide the company with overtime labor because the

6. During the same time period, telecommunications cables, light fixtures, and "bathroom speakers" disappeared from the job site. (Lott Dep. at 133-36).

telecommunications work had been given to USIS. (Lott Dep. at 108, 151-53, 326-27).[7]

Mr. King met with Mr. Tensor and Rodney Graves, the assistant superintendent, and asked them to speak to the electricians who were refusing to work overtime to see if they could "do something about it." (Excerpts of Deposition of Robert King ("King Dep."), attached as Exh. 11 to Andrews Decl., at 118). The electricians indicated to Mr. Tensor and Mr. Graves that they would not work "as long as CWA is present." (King Dep. at 120; Meeting Notes dated Nov. 29, 1999, attached as Exh. 57 to Andrews Decl.; Excerpts of Deposition of John Lagana ("Lagana Dep."), attached as Exh. 12 to Andrews Decl., at 1142). At a meeting held to discuss the issue, Mr. Graves "assured [Mr. Lott and others] that Local 3 would be sure that the project was not completed if the work was not taken away from USIS," and he made references to elevator cables being cut,

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7. After these problems began, the vice-president of Lehrer McGovern Bovis ("LMB"), the general contractor on the project, wrote to Arthur Blee of Constructa, Inc. ("Constructa"), a representative of the building owner, stating that "LMB verbally advised Constructa . . . on numerous occasions that it would not be wise to award this contract to a non-Local 3 contractor." The letter lists a number of problems encountered as a result of the decision to use CWA labor, including the refusal of Local 3 electricians to perform overtime when asked, and states that "there is no way that LMB can force the men to work if they don't want to." (Letter of Harold Lyons dated Nov. 29, 1999 ("Lyons Letter"), attached as Exh. 58 to Andrews Decl.).

things going missing, and people refusing to work. (Lott Dep. at 139-40). Mr. Lott interpreted this as a threat and also felt that Mr. Graves was threatening him personally. (Lott Dep. at 139-42, 160-61, 187). According to Mr. Lott, Mr. King "tried to quiet Mr. Graves down" during this meeting. (Lott Dep. at 142). Eventually, after discussing the matter with Thomas Van Arsdale, business manager of Local 3, Mr. King removed Mr. Graves from the project because "that was not the way that [Mr. King] chose to do business." (Lott Dep. at 155, 332).

At a meeting with representatives of the building owner, LMB indicated that if USIS and Five Star were to continue working on the project together, "concessions would have to be made to [Local 3]." (Lott Dep. at 180). The parties at that meeting discussed the possibility of making a contribution to the Local 3 retirement fund and giving the "wire pull" portion of the telecommunications contract to Five Star and the "terminations" portion to USIS. (Lott Dep. at 180-83, 281). An e-mail from Keith Fordsman, a project manager for Constructa, states that Local 3 believed that a specific task that had been assigned to USIS was a "Local 3 work task" and that he had "negotiated a middle ground with Local 3." (E-mail of Keith Fordsman dated June 13, 2000, attached as Exh. 58 to Andrews Decl.). It is not clear what that "middle ground" entailed, but it appears that Five Star did ultimately perform some part of the telecommunications installation work on the project. (Lott Dep. at 294, 312-13).

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4. *Hugh O'Kane*

The evidence against defenant Hugh O'Kane involves a project for Qwest Communications International, Inc. ("Qwest") at 32 Avenue of the Americas. Although Hugh O'Kane was initially hired as the telecommunications contractor on that project, Qwest replaced the company with plaintiff Blue Diamond Fiber Optic Networks, Inc. ("Blue Diamond") because of problems with Hugh O'Kane's performance. (Declaration of Patrick Marshall dated Aug. 20, 2002 ("Marshall Decl."), attached as Exh. 40 to Andrews Decl., ¶ 5). After the change, Patrick Marshall, the Northeast Region Splice Coordinator for Qwest, did a "walk-through" of the building with several Blue Diamond employees and sub-contractors. During this walk-through, he was informed by the Qwest project manager that the Local 3 shop steward employed by Hugh O'Kane had "threatened that there would be trouble in the building if Blue Diamond were permitted to perform any work at this location." (Marshall Decl., ¶¶ 6-7). Before Blue Diamond started working on the project, "Local 3 members began slowing work down at 32 Avenue of the Americas and at other Qwest projects all over Manhattan" by calling in sick or refusing to work overtime. (Marshall Decl., ¶ 8; Excerpts of Deposition of Richard Mullarkey ("Mullarkey Dep."), attached as Exh. 36 to Toner Decl., at 185). As a result, the telecommunications work on the Qwest project was reassigned to Hugh O'Kane. (Marshall Decl., ¶ 11). After that, the problems with Local 3 members promptly ceased. (Marshall Decl., ¶ 12).

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5. *Nead Information Systems, Inc.*

Nead Information Systems ("NIS") is a telecommunications contractor, while Nead Electric is an electrical contractor, and both employ Local 3 members. Only NIS is a defendant in this case. The parties dispute whether NIS can be held liable with respect to projects that involved only Nead Electric. (Def. 56.1 Stmt., ¶¶ 356-365; Pl. 56.1 Stmt., ¶¶ 356-365; Joint Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Joint Def. Memo.") at 19).

a. *Agency.com*

Both NIS and Nead Electric may have bid on a project for Agency.com (Excerpts of Deposition of Liz Pastore ("Pastore Dep."), attached as Exh. 21 to Andrews Decl. and as Exh. 38 to Toner Decl., at 46), but only Nead Electric actually performed work on the project. (Def. 56.1 Stmt., ¶¶ 371-372). At some point, Structure Tone, the general contractor, told Liz Pastore, facilities manager for Agency.com, that she should "use Local 3 for cabling," but did not specifically reference Nead. (Pastore Dep. at 39, 190). Agency.com nevertheless awarded the telecommunications contract to USIS. (Lagana Dep. at 944; Pastore Dep. at 86). After USIS workers arrived on the job, almost all of the Nead electricians already working on the project refused to work overtime, causing the project to run behind

schedule.[8] (Lagana Dep. at 944-45; Pastore Dep. at 63, 65-68, 169). Nead put more men on the project during the day to make up for the lack of workers willing to work overtime. (Pastore Dep. at 194). Structure Tone told Ms. Pastore that these problems were a result of the fact that she had hired a non-Local 3 contractor. (Pastore Dep. at 121, 134, 218).

b. *Random House (280 Park Avenue)*

The only evidence that relates to the project for Random House is the testimony of Peter Babigian of Walsh-Lowe, an IT consulting firm, that at a meeting with Random House representatives, the general contractor directed Walsh-Lowe to limit bidding for the telecommunications installation at 299 Park Avenue and 280 Park Avenue to Local 3 contractors. (Excerpts of Deposition of Peter Babigian, attached as Exh. 1 to Andrews Decl., at 248-49, 411). It does not appear that NIS received the telecommunications contract, although Nead Electric performed the electrical installation. (Declaration of Robert Eccles dated Aug. 26, 2005, attached as Exh. 123 to Toner Decl., ¶ 19; Declaration of Dana Reed dated Aug. 26, 2005, attached as Exh. 128 to Toner Decl., ¶ 17).

8. Telecommunications cables at the construction site were also cut on several occasions. (Pastore Dep. at 42, 47-48).

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c. *Shearman & Sterling (850 Third Avenue)*

On a project for the law firm of Shearman & Sterling, Nead Electric performed the electrical contracting work and NIS performed the tel-data work. (Def. 56.1 Stmt., ¶ 382; Pl. 56.1 Stmt., ¶ 382). Michael Yee, director of New York operations for Shearman & Sterling, testified that the firm's landlord at 850 Third Avenue had a list of preferred vendors. Nead Electric was the landlord's favored electrical contractor. (Excerpts of Deposition of Michael Yee ("Yee Dep."), attached as Exh. 48 to Toner Decl. and as Exh. 31 to Andrews Decl., at 25-26). Although the landlord required tenants to allow preferred contractors to bid on projects, it did not require tenants to hire those contractors if their bids were not the lowest. (Yee Dep. at 32). While the landlord did not have a preferred telecommunications vendor, it did require the firm to hire a Local 3 contractor for the telecommunications work in order to "avoid labor issues." (Yee Dep. at 22-23, 32, 35). Shearman & Sterling was prepared to "try to talk the landlord out of this requirement" if the lowest bid from a Local 3 contractor was significantly higher than the lowest bid from a non-Local 3 contractor. (Yee Dep. at 36-37).

At some point after the bids came in, the landlord asked Mr. Yee to award both the electrical and the telecommunications contracts to Nead. (Yee Dep. at 43). The landlord's representative indicated that the landlord preferred that Nead do the telecommunications

work because, as the house vendor, "they were familiar with the building systems." (Yee Dep. at 44). He did not mention possible labor unrest or delays. (Yee Dep. at 45). Shearman & Sterling then gave Nead an opportunity to match the lowest bids for both electrical and telecommunications installation, and the firm subsequently chose to hire both Nead Electric and NIS. (Yee Dep. at 58, 63-64, 186).

Russell Ramey, a Shearman & Sterling employee involved in supervising the project, testified that Mark Kanyuk, a technical specialist for the firm, told him that Shearman & Sterling "wouldn't be able to use the freight elevator unless Local 3 was doing the data work." (Excerpts of Deposition of Russell W. Ramey ("Ramey Dep."), attached as Exh. 23 to Andrews Decl., at 99). It is unclear where Mr. Kanyuk got this information. Mr. Ramey also testified that he felt pressure from "the building" (presumably meaning the landlord) and from the general contractor to hire Nead although it was not the lowest qualified bidder. (Ramey Dep. at 102-03, 107-08, 199-200). He testified that Mr. Kanyuk and another Shearman & Sterling employee informed him that the general contractor made statements indicating that "he had been pressured to behave in certain ways, or to give contracts to certain people," but could not say who had put pressure on the general contractor. (Ramey Dep. at 200).

Appendix C

Discussion

A. *Summary Judgment Standard*

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where the evidence offered demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Tocker v. Philip Morris Companies, Inc.*, 470 F.3d 481, 486-87 (2d Cir. 2006); *Andy Warhol Foundation for the Visual Arts, Inc. v. Federal Insurance Co.*, 189 F.3d 208, 214 (2d Cir. 1999). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the moving party meets that burden, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "[A]ll inferences must be drawn in favor of the non-moving party." *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252 (2d Cir. 1987) (internal citations and quotation marks omitted).

However, "to defeat a motion for summary judgment [the non-moving party] cannot rely on conjecture or surmise, and must do more than simply show that there is some metaphysical doubt as to the material facts." *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 723 (2d Cir. 1994) (internal quotation marks and citations omitted). If the court determines that "the record taken as a whole could not lead a rational trier of fact to find

for the non-moving party, there is no genuine issue for trial." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)) (internal quotation marks omitted).

B. *Non-Statutory Labor Exemption*

The defendants contend that, even assuming that there was an agreement between the defendant contractors and Local 3 as alleged by the plaintiffs, that agreement is beyond the reach of the federal antitrust laws because it is subject to the non-statutory labor exemption. The Second Circuit has found that the "classic formulation" of the non-statutory labor exemption is as follows:

> agreements between a union and an employer are exempt from antitrust scrutiny if they are "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and therefore is exempt from the Sherman Act."

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Local 210, Laborers' International Union v. Labor Relations Division Associated General Contracting, 844 F.2d 69, 79 (2d Cir. 1988) (quoting *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689-90, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965) (plurality opinion)); *accord Clarett v. NFL*, 369 F.3d 124, 132 n.12 (2d Cir. 2004); *Berman Enterprises Inc. v. Local 333, United Marine Division, International Longshoremen's Association*, 644 F.2d 930, 935 n.8 (2d Cir. 1981).[9]

The Supreme Court has noted that, "[a]s a matter of logic, it would be difficult, if not impossible, to require . . . employers and employees to bargain together, but at the same time forbid them to make . . . *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996).

Union success in organizing workers and standardizing wages ultimately will affect

9. The statutory labor exemptions contained in the Clayton Act, *see* 15 U.S.C. § 17; 29 U.S.C. § 52, and the Norris-LaGuardia Act, *see* 29 U.S.C. §§ 104, 105, 113, "exempt certain union activities from antitrust scrutiny." *Local 210*, 844 F.2d at 79. The statutory labor exemptions "do not . . . reach concerted activity between a union and a nonlabor party, such as an employer." *Id.* (citations omitted). Accordingly, they are inapplicable here. *See U.S. Info. Sys. v. IBEW Local Union No. 3*, No. 00 Civ. 4763, 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *2 (S.D.N.Y. Jan. 23, 2002).

> price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. . . . Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, . . . the nonstatutory exemption offers no similar protection when a union and nonlabor party agree to restrain competition in a business market.

Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 622-23, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975) (internal citations omitted); *see also Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 808, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945) ("Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.").

The purpose of the non-statutory exemption is "to prevent intrusion upon the collective bargaining process." *U.S. Info. Sys.*, 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *3. However, the exemption does not apply only "to understandings embodied in a collective-bargaining agreement — for the collective-bargaining

process may take place before the making of any agreement or after an agreement has expired." *Brown*, 518 U.S. at 243. Rather, the exemption applies "where needed to make the collective-bargaining process work." *Id.* at 234.

The defendants contend that, even assuming there was an agreement between Local 3 and the defendant contractors, such an agreement is exempt from antitrust scrutiny because it arose "in the context of collective bargaining." (Joint Def. Memo. at 42). The Court rejected this claim when it denied the defendants' motion to dismiss. *See U.S. Info. Sys.*, 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *3. In the present motion, the defendants assert that the collective bargaining agreement between Local 3 and the contractors' associations to which the defendant contractors belong, which the Court may consider on summary judgment, makes it clear that the exemption is applicable here. (Joint Def. Memo. at 42). The defendants maintain that Article III of the collective bargaining agreement gives members of Local 3 the right to refuse overtime,[10] while

10. Article III, Rule 3(m) states that the foreman must call the union to ask for permission for the electricians to work overtime. (Agreement and Working Rules between New York Electrical Contractors Association, Inc., Association of Electrical Contractors, Inc., and Local 3 ("CBA"), attached as Exh. 114 to Toner Decl. and as Exh. 50 to Andrews Decl., Art. III, Rule 3(m)). Rule 5 states that overtime is not permitted except in emergencies and that members may not work overtime without permission from the Local 3 Business (Cont'd)

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Article VIII forbids members to disrupt work when there are jurisdictional disputes with other unions.[11] (Memorandum of Law on Behalf of Defendant Local 3 in Support of the Motion for Summary Judgment ("Local 3 Memo.") at 15-16). The defendants claim that because the collective bargaining agreement contains these provisions, any "communications" between Local 3 and the defendant contractors regarding job site vandalism or workers' refusal to work overtime are protected by the non-statutory labor exemption. (Local 3 Memo. at 16-17). This argument is utterly lacking in merit. The agreement alleged by the plaintiffs is not one reached by an employer and a union in the course of collective bargaining. The fact that the collective bargaining agreement addresses work stoppages and overtime does not mean that a conspiracy between Local 3 and the defendant contractors to use or threaten to use such tactics in order to exclude CWA contractors

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Manager's Office. (CBA, Rule 5). The defendants note that "[t]here is no clause in the CBA which obliges an individual worker to work any overtime at all." (Affidavit of Joseph D'Angelo dated Aug. 24, 2005, attached as Exh. 122 to Toner Decl., ¶ 4). However, Thomas Carino, Sr. formerly the Chief Operating Officer of IPC, testified that under the collective bargaining agreement, workers do not have the right to refuse to work overtime if the contractor requests it. (Excerpts of Deposition of Thomas Carino, Sr., attached as Exh. 3 to Andrews Decl., at 195-97).

11. Article VII states in part that "[t]here will be no strikes, no work stoppages or slow down[s] or other interferences with the work because of jurisdictional disputes." (CBA, Art. VIII).

from the tel-data installation market is somehow embodied in the collective bargaining agreement. Nor is the alleged agreement in any way "needed to make the collective bargaining process work." *Brown*, 518 U.S. at 234. Consequently, subjecting the defendants' actions to antitrust scrutiny does not risk intruding upon the collective bargaining process.[12]

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12. The defendants also claim that the alleged agreement between the defendants would be subject to the "construction industry proviso" of § 8(e) of the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 158(e). That provision exempts certain aspects of the construction industry from the NLRA's ban on so-called "hot cargo clauses" in collective bargaining agreements. *Local 210*, 844 F.2d at 72-73. A "hot cargo clause" is an agreement by an employer, at the union's behest, "to boycott the goods or services of other employers that did not comply with union standards or recognize a union." *Id.* at 72 (citations omitted). The alleged conspiracy at issue here does not involve such an agreement, and therefore does not appear to fall within the scope of the proviso. However, even assuming that it does, the proviso protects employers and unions within the construction industry only from scrutiny under § 8(e) of the NLRA. In order to be exempt from antitrust scrutiny, an agreement that is subject to the construction industry proviso must also fall within the scope of "'one of two recognized labor law exemptions from antitrust scrutiny — the statutory and non-statutory exemptions.'" *Drywall Tapers & Pointers, Local Union Local 1974 v. Bovis Lend Lease Interiors, Inc.*, No. 05 Civ. 2746, 2005 U.S. Dist. LEXIS 19632, 2005 WL 2205836, at *15 (E.D.N.Y. Sept. 9, 2005) (quoting *Local 210*, 844 F.2d at 79). As explained above, neither of these exemptions applies here.

Appendix C

D. *Sherman Act*

1. *Elements of § 1 Claim*

Section 1 of the Sherman Act provides that "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. To establish a § 1 violation, the plaintiffs must produce evidence sufficient to show: (1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) that such combination or conduct constituted an unreasonable restraint of trade either *per se* or under the "rule of reason."[13] *U.S. Info. Sys.*,

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13. "Conduct considered illegal *per se* is invoked only in a limited class of cases where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are 'conclusively presumed illegal without further examination.'" *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.*, 996 F.2d 537, 542 (2d Cir. 1993) (quoting *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)); *see also Leegin Creative Leather Prods. v. PSKS, Inc.*, __ U.S. __, __, 127 S. Ct. 2705, 2713, 168 L. Ed. 2d 623 (2007) (explaining that *per se* rule is limited to restraints "that would always or almost always tend to restrict competition and decrease output" (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)). "Most antitrust claims . . . are analyzed under a 'rule of reason' analysis which seeks to determine if the alleged restraint is unreasonable because its 'anti[-]competitive effects outweigh

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2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *4 (citing *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95-96 (2d Cir. 1998)). In addition, the plaintiffs must establish that they have "antitrust standing" and that they have suffered "antitrust injury."[14] *Atlantic Richfield*, 495 U.S. at 334; *National Camp Ass'n v. American Camping Ass'n*, No. 99 Civ. 11853, 2000 U.S. Dist. LEXIS 18194, 2000 WL 1844764, at *3 (S.D.N.Y. Dec. 15, 2000).

2. *Conspiracy*

a. *Legal Standard*

"Independent actions taken by an entity fall outside the purview of § 1." *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 263 (2d Cir. 2001); *accord Capital Imaging Associates*, 996 F.2d at 542. To prevail on their § 1 claim, therefore, the plaintiffs must

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its pro[-]competitive effects.'" *E & L Consulting, Ltd. v. Doman Industries Ltd.*, 472 F.3d 23, 29 (2d Cir. 2006) (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)).

14. The plaintiffs must also "adequately . . . define the relevant product market." *Rock TV Entertainment, Inc. v. Time Warner, Inc.*, No. 97 Civ. 0161, 1998 U.S. Dist. LEXIS 799, 1998 WL 37498, at *2 (S.D.N.Y. Jan. 30, 1998) (quotations and citation omitted). However, the defendants have stated that they "are not challenging the 'relevant market' for purposes of this motion." (Joint Def. Memo. at 4 n.4).

demonstrate that the defendants conspired together, meaning that they "were consciously committed 'to a common scheme designed to achieve an unlawful objective.'" *Virgin Atlantic*, 257 F.3d at 263 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)); *see also Bell Atl. Corp. v. Twombly*, __ U.S. __, __, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) ("[T]he crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express." (internal quotation marks and citation omitted)). In order to survive a motion for summary judgment, it is "critical" that the plaintiff make a threshold showing that "a reasonable jury could find that the defendants' actions were concerted rather than independent." *AD/SAT, Division of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 233 (2d Cir. 1999).

A threshold showing may be made using circumstantial evidence alone, since "direct proof of an illegal agreement is rarely available." *Building Indus. Fund v. Local Union No. 3, IBEW*, 992 F. Supp. 162, 181 (E.D.N.Y. 1996); *see also Venture Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d 41, 45 (2d Cir. 1982) ("Illegal conspiracies, of course, can rarely be proved through evidence of explicit agreement, but must generally be proved through inferences from the conduct of the alleged conspirators." (citing *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir. 1976))). However, "antitrust law limits the range of permissible inferences from ambiguous evidence." *Matsushita*, 475 U.S. at 588. "[C]onduct as consistent

with permissible conduct as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* (citing *Monsanto*, 465 U.S. at 764). In order to prevail on a motion for summary judgment, a plaintiff must therefore "present evidence that 'tends to exclude the possibility that the alleged conspirators acted independently.'" *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC*, No. 03 Civ. 1895, 2007 U.S. Dist. LEXIS 504, 2007 WL 39301, at *7 (S.D.N.Y. Jan. 8, 2007) (quoting *Matsushita*, 475 U.S. at 588).

> [T]he Second Circuit has . . . stressed that where competing versions of the facts are equally plausible, the case should not be decided by a jury: "[w]e have overturned jury verdicts where, taken as a whole, the evidence point[ed] with at least as much force toward unilateral actions by [the defendants] as toward conspiracy, and a jury would have to engage in impermissible speculation to reach the latter conclusion."

Building Indus. Fund, 992 F. Supp. at 181 (quoting *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 794 (2d Cir. 1987) (alterations in original).

b. *Evidence of Conspiracy*

The plaintiffs first contend that while circumstantial evidence is sufficient to prove a conspiracy, in this case "the defendant[] contractors have . . . actually agreed

in writing to 'continually endeavor' to shill for Local 3 workers." (Pl. Memo. at 3). The plaintiffs maintain that Article III, Rule 2(f) of the collective bargaining agreement between the defendant contractors and Local 3 is direct proof of a conspiracy. That provision reads as follows:

> Every individual Employer agrees in addition to his regular work to solicit and perform residential, industrial and small types of work. The Employer will continually endeavor to make available and increase the volume of employment for electrical workers through salesmanship, enterprising business methods, being properly equipped to render efficient electrical services to the community, by promoting and encouraging modern installations and aiding the industry to educate the public of the need for improved electrical installations and expansion.

(CBA, Art. III, Rule 2(f)). The plaintiffs interpret this provision as an agreement by the contractors to use improper means, such as threats of work stoppages and vandalism, to force telecommunications contracts to be awarded to Local 3 contractors, thereby ensuring employment for Local 3 workers. The plaintiffs claim that this provision, when considered in conjunction with the other evidence they have submitted, "could readily be found by a jury as furthering a common purpose, and is certainly consistent with the classic conspiracy paradigm of an agreement coupled with overt acts in

furtherance of an agreement." (Pl. Memo. at 3). However, there is no reason to believe that, in this context, "enterprising business methods" means anything sinister. The remainder of the plaintiffs' evidence does not justify an inference that Article III, Rule 2(f) is anything other than what it appears to be: a promise to use whatever lawful means are available to increase the demand for Local 3 labor.

The plaintiffs also make much of a meeting between representatives of Local 3 and various electrical contractors that apparently took place in 1996 or 1997. (Pl. Memo. at 9-10). Robert Eccles, Executive Vice President of defendant Nead Information Systems, testified that he put together a list of topics for Robert Marziotto, who is affiliated with both Nead Information Systems and Nead Electric, to bring up at the meeting.[15] (Excerpts of Deposition of Robert Eccles ("Eccles Dep."), attached as Exh. 8 to Andrews Decl., at 122-23). The first topic on the list reads: "CWA problem with respect to comp[et]ition s[c]enario, procedure when threatened by CWA and future of telecommunications with Local 3?" ("Topics for Meeting w/ Local Three," attached as Exh. 54 to Andrews Decl.). Mr. Eccles testified that he was referring to the possibility of

15. The plaintiffs contend that the meeting was held specifically to discuss the issue of jobs lost to CWA contractors, but there is no evidence to that effect. Nor is there any direct evidence that any of the defendant contractors besides NIS attended the meeting. (*See* Eccles Dep. at 122-26, 132, 139; Excerpts of Deposition of Raymond A. Melville, attached as Exh. 20 to Andrews Decl., at 164-65).

implementing a different wage scale for workers who performed tel-data work, as opposed to high voltage work, so that Local 3 contractors would be better able to compete for telecommunications contracts:

> A. Can I go back and give this candidate labor rates, are they going to offer H rates again. . . . What do I do. What's my procedure. Since you don't have a dialogue with them and you —
>
> Q. With Local 3?
>
> A. — there's no open communication. Is there something they can tell me to do to try and go and compete. Give me some direction that's real, that I can go to the client and say, I'll offer a great proposal, this wonderful proposal at a great number, and we can go win the work.

(Eccles Dep. at 125-26, 139).[16]

16. In September 1998, Mr. Eccles himself met with a representative of Local 3 to discuss the fact that Nead was losing telecommunications bids to CWA contractors. (Eccles Dep. at 108). In a letter to Mark Hansen, a business agent for Local 3, Mr. Eccles stated, "We are losing as much work to CWA as we are winning now and [it is] getting worse." (Letter of Robert Eccles dated Sept. 1, 1998 ("Eccles Letter"), attached as Exh. 54 to Andrews Decl.). Mr. Eccles sought a meeting with Mr. Hansen "to discuss this problem and review any (Cont'd)

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The plaintiffs offer no evidence that representatives of Local 3 and the defendant contractors discussed the possibility of winning contracts by threatening to engage in vandalism or withhold overtime at that meeting or at any other time.[17] The plaintiffs themselves assert that Local 3 contractors were regularly losing telecommunications bids to CWA contractors during this time period because the higher wages commanded by Local 3 electricians made it difficult to compete. (Pl. Memo. at 8-9). It is hardly surprising that contractors employing Local 3 electricians would discuss the issue with union representatives. The evidence submitted by the plaintiffs, even when taken as a whole, does not justify an inference that the list of topics for discussion drafted by Mr. Eccles was anything other than an attempt to start a discussion with Local 3 regarding the possibility of wage concessions or other legitimate ways to increase the competitiveness of Local 3 contractors in the telecommunications market.

The plaintiffs also rely heavily on evidence of the perceptions of customers and general contractors,

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recommendations you may have to competing in this marketplace [sic]." (Eccles Letter). Mr. Eccles eventually met with Howard Cohen of Local 3, but according to Mr. Eccles, Mr. Cohen "listened intently and nothing happened." (Eccles Dep. at 108).

17. Indeed, there is no evidence that the representatives at the meeting discussed Nead's list of concerns at all; Mr. Eccles testified that he did not think that Mr. Marziotto "ever got a chance to speak" at the meeting. (Eccles Dep. at 126).

asserting that their "proof consists not only of evidence of specific situations where CWA's presence on the job site has led to disruptive acts by Local 3 . . . but more importantly, evidence of the state of mind fostered by the perception of the 'Local 3 problem' among those in the industry." (Pl. Memo. at 7). But even were this evidence sufficient to prove intimidation, the plaintiffs have offered little to support an inference that this "state of mind" arose as a result of the actions of anyone other than Local 3. An antitrust plaintiff cannot "rest on his allegations of a conspiracy to get to a jury without 'any significant probative evidence tending to support the complaint.'" *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (quoting *First National*, 391 U.S. at 290). It is therefore necessary to examine the available evidence against each defendant contractor to determine whether the plaintiffs have put forward sufficient circumstantial evidence to permit an inference of conspiracy.

The plaintiffs have offered no evidence to support their claims that A R and NIS were part of a conspiracy. In the case of A R, there is evidence only that a business agent of Local 3 threatened an employee of a general contractor (Syntegra), as a result of which the work was awarded to A R. This does not support an inference that A R was part of the alleged conspiracy. Nor does the evidence implicate NIS in such a conspiracy, even assuming that NIS may be held responsible for actions taken by Nead Electric. On the Agency.com project, a general contractor (Structure Tone) told the owner's representative that she should hire a Local 3

telecommunications contractor. When she hired USIS, Nead Electric employees refused to work overtime. The plaintiffs have put forward no evidence to support an inference that Local 3 acted in concert with Nead Electric to force the owner to rescind its contract with USIS. Indeed, it appears that by putting more electricians to work during the regular work day, Nead Electric sought to ensure that its electricians' refusal to work overtime did not inconvenience the customer.

With respect to the Random House and Shearman & Sterling projects, the evidence reveals only that third parties (two general contractors and a building owner) required customers to use Local 3 contractors for telecommunications work. There is no evidence that they did so because they had been threatened by NIS, Nead Electric, or any other defendant contractor.[18]

With respect to the remaining defendants, there is some evidence that their employees told customers that hiring a CWA contractor would result in problems for the customer. In the case of Hugh O'Kane, there is evidence that a Local 3 shop steward stated that "there would be trouble in the building" if plaintiff Blue Diamond was awarded the contract. There is also evidence that employees of ADCO and Five Star told representatives of the building owners on two projects

18. Although Shearman & Sterling's landlord did specifically ask the firm to hire NIS, its stated reason for doing so was it would make the work more efficient because Nead Electric was the "house vendor" and therefore the company was familiar with the building.

that electricians would not work overtime because the telecommunications work had been given to USIS. However, these incidents are insufficient to permit the plaintiffs to avoid summary judgment. As explained above, an antitrust plaintiff must "present evidence that 'tends to exclude the possibility that the alleged conspirators acted independently.'" *Reading Int'l, Inc.*, 2007 U.S. Dist. LEXIS 504, 2007 WL 39301, at *7 (quoting *Matsushita*, 475 U.S. at 588). In this case, the plaintiffs have not met their burden.

To begin with, it is not clear that the employees who made the statements at issue acted with the knowledge or approval of their employers. Each of the employees was a member of Local 3, and the Hugh O'Kane employee is identified as a union shop steward. According to the construction manager, Mr. Lott, when Mr. Graves, the Five Star assistant superintendent, threatened him at a meeting, he appeared to speak on behalf of Local 3, stating that the union "would be sure that the project was not completed if the work was not taken away from USIS." (Lott Dep. at 139). Indeed, Mr. Lott testified that the Five Star project manager removed Mr. Graves from the project after his outburst.[19]

19. Nor do the plaintiffs dispute that ADCO, in an apparent attempt to avoid delays, reassigned six workers who had refused to work overtime. This kind of behavior indicates that Five Star and ADCO sought to mitigate the damage caused by their workers' actions, rather than use it as a bargaining tool to force customers to give the telecommunications contract to a Local 3 contractor.

Even assuming that the defendant contractors endorsed or condoned the statements at issue, however, it is entirely plausible that they did so in the absence of any agreement with Local 3 or with one another. Given Local 3's past actions and longstanding history of hostility toward CWA, the defendant contractors might well have been concerned that the presence of a CWA contractor on the job site would result in construction delays. Accordingly, they had an incentive to preserve their reputation by warning

> the general contractor or the customer of a possible Local 3 "problem" beyond [their] control. Suppose that the contractor using Local 3 labor had been aware of the potential for disruption and delay but did not warn the general contractor or the customer. If the disruption or delay occurred and the general contractor or customer believed that the contractor using Local 3 labor was or should have been aware of this potential, the reputation of that contractor would be diminished.

(Declaration of John R. Woodbury dated Feb. 16, 2007 ("Woodbury Decl."), ¶ 15). Furthermore, the contractor stood to benefit directly because such "warnings" increased the chances that it would be awarded telecommunications contracts.[20] (Woodbury Decl., ¶ 16).

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20. Of course, the customer might be able to avoid conflict with Local 3 electricians by hiring a *different* Local 3 contractor for the telecommunications work. But the defendant contractors

(Cont'd)

However unfair it might seem to the plaintiffs for the defendant contractors to benefit from the misbehavior of their employees, such a benefit does not violate the antitrust laws unless it was a result of concerted, rather than independent, action.

The plaintiffs insist that "[i]n a normal business setting," a contractor that told customers that its employees were going to cause scheduling delays and raise construction costs would suffer damage to its reputation and would be fired or would lose future business. (Pl. Memo. at 4-5; Sec. Compl., ¶ 40). They maintain that such behavior would only be rational in the context of the alleged conspiracy. According to the plaintiffs, the defendant contractors could afford to let customers know that they could not control their employees because they knew that "all other Local 3 contractors would deliver the same message" and that the customer therefore had no real choice. (Pl. Memo. at 4).

(Cont'd)
could reasonably assume that since they were already on the job and could begin right away, the customer would be reasonably likely to choose them as the replacement telecommunications contractor. Indeed, Five Star, ADCO, and Hugh O'Kane were each awarded telecommunications work on the projects in question after their employees began to cause construction delays. Although the Complaint refers to "numerous instances" in which electrical contractors whose employees stopped working overtime or committed vandalism "did not seek or obtain the telecommunications installation work" (Sec. Compl., ¶ 40), the plaintiffs have put forward no admissible evidence to that effect.

However, such behavior would also be rational in the absence of a conspiracy if each defendant contractor was aware, based upon the jurisdictional dispute between CWA and Local 3, that Local 3 members would cause problems, regardless of which electrical contractor they worked for, when a CWA contractor was on site. No other electrical contractor would have a competitive advantage, since they would encounter the same difficulties with their own employees.[21] Each electrical contractor would "deliver the same message" not because they had conspired together to do so but because none of them could control Local 3's actions. In this context, the defendant contractors would run very little risk of reputational harm or loss of business by telling customers that their employees were likely to cause problems.[22]

---

21. "Virtually all large commercial construction sites in the New York metropolitan area utilize only union labor" (Pl. Memo. at 6), and the vast majority of, if not all, union electricians in the New York City area are members of Local 3. (Sec. Compl., ¶ 20). Although a general contractor or building owner might be able to hire a non-unionized electrical contractor, that decision would hardly be a practical one, since it would invite protests by Local 3 and other building trades workers on the job site.

22. The plaintiffs also contend that in the absence of a conspiracy, the defendant contractors would have disciplined those workers who refused to work overtime. (Pl. Memo. at 28, 30-31). However, the defendant contractors' decision not to enforce any remedy they may have had under the collective bargaining agreement could be a rational one even in the absence of a conspiracy. For example, the contractors may have chosen not to enforce the collective bargaining agreement in order to maintain peace with Local 3.

Appendix C

The plaintiffs claim that the defendant contractors' conduct is "too consistent to be coincidental rather than coordinated among themselves and through [Local 3]." (Sec. Compl., ¶ 40). But it is equally plausible that the defendants acted in their own self-interest independent of Local 3 and of one another. In another type of case, the finder of fact might well be permitted to infer a conspiracy based upon the evidence put forward by the plaintiffs. However, "the *factual and legal context* within which each party presents its evidence . . . determines what are the *reasonable* inferences to be drawn from that evidence." *R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 58 (2d Cir. 1997) (emphasis in original). On summary judgment, "although the court must draw the inferences in favor of the non-moving party, the permissible inferences are ultimately limited by the relevant substantive law." *Id.* Under the standard set forth by the Supreme Court in *Matsushita*, this Court cannot permit an antitrust case to go to trial where the evidence is "as consistent with permissible conduct as with illegal conspiracy." 475 U.S. at 588 (citing *Monsanto*, 465 U.S. at 764). Accordingly, summary judgment should be granted to the defendant contractors.

As explained above, unilateral conduct is outside the scope of § 1 of the Sherman Act. If Local 3 did in fact threaten building owners and general contractors and encourage its members to engage in workplace misconduct, it might well be liable for extortion. Its actions might also violate the collective bargaining agreement or constitute an unfair labor practice under the NLRA. However, Local 3's actions cannot constitute

an antitrust violation under § 1 unless the union acted in concert with others. Because the plaintiffs have not put forward sufficient evidence that the defendant contractors conspired with Local 3 to exclude them from the telecommunications installation market, their claims against Local 3 should likewise be dismissed.[23]

E. *State Law Claims*

Generally, when all federal claims are dismissed, the remaining state claims should be dismissed without prejudice. *Kolari v. New York-Presbyterian Hospital*, 455 F.3d 118, 122 (2d Cir. 2006); *In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 61 (2d Cir. 1998). "Although this is not a mandatory rule, the Supreme Court has stated that 'in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent

---

23. It is therefore unnecessary to address the plaintiffs' request that I reconsider my August 1, 2006 decision insofar as it barred the plaintiffs from relying on a series of judicial and administrative decisions that document Local 3's "total job policy" of using work stoppages, violence, and vandalism to obtain tel-data installation work. (Pl. Memo. at 5 n.6, 33-43). Even assuming that the total job policy remains in effect, unilateral action by Local 3 to keep CWA out of the tel-data installation trade does not violate the Sherman Act. It is also unnecessary to address the defendants' contention that, under § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, in order to hold Local 3 responsible for any acts by its members or officers, the plaintiffs must present "clear proof" that the union participated in, authorized, or ratified the alleged act. (Joint Def. Memo. at 12-13; Local 3 Memo. at 8-9).

jurisdiction doctrine — judicial economy, convenience, fairness and comity — will point toward declining jurisdiction over the remaining state-law claims.'" *Merrill Lynch*, 154 F.3d at 61 (quoting *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)); *see also Kolari*, 455 F3d at 122.

Here, the plaintiffs allege that the defendants' conduct violated § 340 of the New York General Business Law, known as the Donnelly Act. That statute renders illegal any contract, arrangement, or agreement that restrains competition in any business. *Great Atlantic & Pacific Tea Co. v. Town of East Hampton*, 997 F. Supp. 340, 352 (E.D.N.Y. 1998). It "is patterned after the Sherman Anti-Trust Act . . . and is generally construed in light of federal precedent." *Id.*; *accord Re-Alco Industries, Inc. v. National Center for Health Education, Inc.*, 812 F. Supp. 387, 393 (S.D.N.Y. 1993). Thus, "[l]ike § 1 of the Sherman Act, § 340 prohibits only concerted action." *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 408 F. Supp. 1251, 1283 (S.D.N.Y. 1976); *see also Reading International*, 317 F. Supp. 2d at 332-33 ("Under New York law, the state and federal antitrust statutes require identical basic elements of proof." (internal quotation marks and citation omitted)).

However, it is not clear that the heightened standard for demonstrating an antitrust conspiracy that governs claims under § 1 of the Sherman Act also applies to the Donnelly Act. The parties have not identified a case from

the New York state courts that establishes such a principle, and I have found none.[24] It is therefore prudent to dismiss the Donnelly claims without prejudice. *See Gonzalez v. St. Margaret's House Housing Development Fund Corp.*, 880 F.2d 1514, 1520 (2d Cir. 1989) (if federal antitrust claims dismissed, court has discretion to decline jurisdiction over Donnelly Act claim); *Omega Homes, Inc. v. City of Buffalo*, 4 F. Supp. 2d 187, 194-95 (W.D.N.Y. 1998) (declining jurisdiction over Donnelly Act claims after dismissing federal antitrust claims).

Similarly, the Court should decline jurisdiction over the plaintiffs' claims of tortious interference against the defendant contractors. The analogous claims against Local 3 were previously dismissed. *U.S. Infor. Sys.*, 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *13.

Conclusion

For the reasons set forth above, I recommend that summary judgment be granted to the defendants, and that the plaintiffs' claims under § 1 of the Sherman Act

---

24. One federal district court opinion rejected claims under both § 1 of the Sherman Act and the Donnelly Act because, based on the evidence, an inference of conspiracy was no more plausible than a finding that the defendants had acted unilaterally. *Tokarz v. LOT Polish Airlines*, No. 96 CV 3154, 2006 U.S. Dist. LEXIS 72118, 2006 WL 2850611, at *4-*5 (E.D.N.Y. Oct. 3, 2006). The court relied, however, only on the general proposition that the Donnelly Act is construed consistently with the Sherman Act. 2006 U.S. Dist. LEXIS 72118, [WL] at *3.

be dismissed. I further recommend that the plaintiffs' remaining state law claims be dismissed without prejudice. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Richard M. Berman, U.S.D.J., Room 650, and to the chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

s/ James C. Francis IV
JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
August 3, 2007

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 12, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of May, two thousand ten.

No. 07-4214-cv

U.S. INFORMATION SYSTEMS, INC., ODYSSEY GROUP INC., and BLUE DIAMOND FIBER OPTIC NETWORKS, INC.,

Plaintiffs-Counter-Defendants-Appellants,

- v -

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NUMBER 3, ADCO ELECTRICAL CORPORATION, FIVE STAR ELECTRIC CORPORATION, NEAD INFORMATION SYSTEMS, and HUGH O'KANE ELECTRIC COMPANY LLC,

Defendants-Appellees,

Appendix D

A & R ELECTRICAL, MAINTENANCE, INC., FOREST ELECTRIC CORPORATION, and IPC COMMUNICATIONS, INC.,

Defendants,

A R COMMUNICATIONS CONTRACTORS INC.,

Counter-Claimant-Appellee.

U.S. Information Systems, Inc., Odyssey Group Inc. and Blue Diamond Fiber Optic Networks, Inc., having filed a petition for panel rehearing or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of the Court

APPENDIX E — STATUTORY PROVISIONS INVOLVED

This case concerns Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1:

> **Trusts, etc., in restraint of trade illegal; penalty**
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

and Rule 56 of the Federal Rules of Civil Procedure:

Appendix E

RULE 56. SUMMARY JUDGMENT

(a) By a Claiming Party.

A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(b) By a Defending Party.

A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Time for a Motion, Response, and Reply; Proceedings.

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) Establishing Facts.

If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) Establishing Liability.

An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) In General.

Appendix E

A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) Opposing Party's Obligation to Respond.

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable.

If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

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No. 10-205 (2)

Supreme Court, U.S.
FILED
OCT 13 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

U.S. INFO. SYSTEMS, INC.,
ODYSSEY GROUP INC., AND BLUE DIAMOND
FIBER OPTIC NETWORKS, INC.,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS LOCAL UNION NUMBER 3, AFL-CIO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF NAMED RESPONDENTS

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QUESTIONS PRESENTED

1. Is any issue presented for review when three lower courts applied the summary judgment standards for inferring a conspiracy articulated in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) in exactly the manner recently confirmed in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007), and consistently and recently applied in other Circuits, when the Petition is premised on the claim that *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), *sub silentio*, revised *Matsushita* and it urges a new standard for summary judgment which avoids the well-settled limits on the ability to infer a conspiracy without any basis in precedent, economics or logic and which was not urged below?

2. Is there any reason for further antitrust review of an extensive factual record relating to isolated claims of jobsite conduct on a few of thousands of locations where rival labor unions overlap when that record contains no proof of conspiratorial behavior after years of discovery, and where there is abundant evidence and economic principles which required the conclusions uniformly reached below, and Petitioners made a decision not to attempt to refute the evidence and economic principles which negated a conspiracy?

3. Can review of a non-precedential summary order of the Second Circuit provide a basis to revisit the application of well settled summary judgment standards to the evidence carefully scrutinized by the Magistrate Judge, the District Court and the Court of Appeals?

PARTIES TO THE PROCEEDING

1. U.S. Information Systems, Inc. ("USIS"), Odyssey Group, Inc., and Blue Diamond Fiber Optic Networks, Inc.

2. International Brotherhood of Electrical Workers Local Union Number 3, AFL-CIO ("Local 3"), and Local 3 signatory contractors ADCO Electrical Corporation, Five Star Electrical Corporation, Nead Information Systems, Hugh O'Kane Electric Company, LLC and A&R Electrical Maintenance, Inc.

RULE 29.6 DISCLOSURE

Respondent Five Star Electrical Corporation is a privately held corporation whose stock is wholly owned by its privately held parent corporation, Green Star Services Corp., and no publicly held corporation owns 10% or more of its stock.

Respondent Hugh O'Kane Electric Company LLC is a privately held corporation whose stock is wholly owned by its privately held parent corporation, Lexent, Inc., and no publicly held corporation owns 10% or more of its stock.

Respondent ADCO Electrical Corporation is a privately held corporation with no corporate parent, and no publicly held corporation holds 10% or more of its stock.

Respondent International Brotherhood of Electrical Workers Local Union Number 3, AFL-CIO, is an unincorporated association of workers functioning as a labor organization in New York City, Westchester County and part of Fairfield, Connecticut.

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STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

Respondents moved for summary judgment after pretrial proceedings that involved more than 100 subpoenas, well over 250,000 pages of documents, nine expert reports, eight days of expert depositions, and at least 420 hours of testimony from 40 different fact witnesses. A detailed Report and Recommendation applied the rules set forth in *Matsushita* and *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) to this extensive record and found "no evidence" (Petitioners' Appendix ("App.") C, 44a) of the conspiracy required for a claim under Section 1 of the Sherman Act (the "Report"). Summary judgment was recommended and confirmed after a *de novo* review by the District Court (App. B, 6a-12a). A panel of the Second Circuit conducted a *de novo* review of the record and affirmed the decision of the District Court in an unsigned, non-precedential summary order (App. A, 2a-5a). *En banc* review was denied (App. D, 56a-57a).

The Report applied criteria for determining the adequacy of the proof in support of the effort to infer a conspiracy drawn directly from the "tends to exclude" language of *Matsushita*. It reflected consideration of all of the evidence relied on by Petitioners to support the inference of a conspiracy (App. C, 38a-52a) among respondent Local 3 and the other named respondents which are electrical contractors employing Local 3 members, as well as the dozens of other firms employing Local 3 members. The Report explicitly drew all inferences in favor of the non-moving parties. It

recommended, based "on the record taken as a whole," that summary judgment be granted in favor of the Respondents because of the absence of proof of a conspiracy. In opposing summary judgment, Petitioners chose not to meet their burden to proffer any evidence in response to the proof and economic evidence which negated a conspiracy, and which supported the plausible alternative non-conspiratorial explanations established by Respondents. Instead, they made the strategic choice to rely only on their own "proof" and assert that if a plaintiff, in opposing summary judgment, offers any proof of an inferential conspiracy, it is entitled to go to the jury (Pls' App. Br. pp. 36 and 40).

The Report of the Magistrate Judge states:

> The plaintiffs offer no evidence that representatives of Local 3 and the defendant contractors discussed the possibility of winning contracts by threatening to engage in vandalism or withhold overtime at that meeting or at any other time (App. C, 44a).

This critical conclusion that there was no proof of concerted action was later repeated (App. C, 51a-52a).

The District Judge conducted a *de novo* review of the record and also found that the possibility of jobsite action by some individuals on isolated projects could not substitute for the absence of proof of a conspiracy (App. B, 11a-12a). The Court of Appeals similarly conducted a *de novo* review and issued a Summary Order with no precedential effect which found that the proper antitrust summary judgment standard set forth in

Matsushita had been applied, that it was not changed by *Kodak*, and that the District Court properly granted summary judgment to Respondents (App. A, 4a). The entire Second Circuit denied the Petitioners' motion for a rehearing *en banc*, premised on Petitioners' argument that the Panel had impermissibly "weighed" the proof.

In an earlier opinion, the Magistrate Judge had addressed many of the decades-old decisions and decrees in labor related proceedings on which Petitioners now rely in attacking Local 3 (Pet. pp. 4-5). Petitioners fail to disclose that these decisions and decrees were considered and ruled inadmissible. *See U.S. Info. Systems, Inc. v. I.B.E.W. Local Union No. 3*, No. 00-4763, 2006 U.S. Dist. LEXIS 52938, at **52-57 (S.D.N.Y. Aug. 1, 2006). Petitioners did not seek review of this decision which became the law of the case. It is therefore improper for Petitioners to propose to rely on these inadmissible determinations, which are in any event irrelevant to the issue of conspiracy.

The Magistrate Judge observed that the conduct alleged by Petitioners, if proven, could also be cognizable under other statutes such as the National Labor Relations Act or the penal code (App. C, 51a). The Opinion does not conclude that there was such proof, but properly concludes that in a Section 1 case, such assertions are not a substitute for the requisite proof of concerted action (App. C, 52a).

II. THE LEGAL PRINCIPLES UNIFORMLY APPLIED BELOW AND THE PETITIONERS' PROPOSED NEW PRINCIPLES

All of the courts below applied the well-settled summary judgment standards articulated in *Matsushita* to Petitioners' argument that a conspiracy could be inferred. Their application of these standards was consistent with controlling precedent and raised no controversial issues of law. The same analyses and applications of *Matsushita* have recently been recognized as controlling in several Circuit Court opinions, and were confirmed by *Twombly* as the governing authority on summary judgment when there is a claim that an antitrust conspiracy should be inferred.

Petitioners premise their first Question Presented on the proposition that these standards were either previously modified or made inapplicable by a sentence in *Kodak*, a case which had nothing to do with the inference of a conspiracy. No court addressing an effort to infer a conspiracy has endorsed Petitioners' theory about *Kodak*, or expressed any hesitation in applying the summary judgment standards as articulated in *Matsushita* and as applied by the courts in this case. Three Circuit Courts of Appeals have previously addressed this argument, including the Second Circuit here, and uniformly found it baseless. In the proceedings below, the Petitioners candidly argued that, under their reading of *Kodak*, a court addressing a summary judgment motion need only review the plaintiff's claims and proposed inferences in a vacuum, without consideration of the defendants' proof and the non-conspiratorial explanations for the conduct alleged, *i.e.*,

Petitioners argued a plaintiff had no obligation to provide proof or respond to the showing by defendants that there was no basis for finding concerted action.

Petitioners have now revised their theory, and contend that *Kodak* limits *Matsushita*'s "tends to exclude" language to "implausible" conspiracies that are otherwise socially redeeming (Pet. pp. 16-19, 25-26). They advocate the creation of a lower threshold for proof of conspiracy where a plaintiff attaches pejorative labels to the conduct alleged. Such a proposed standard is not supported by any authority or logic, nor tenable as an antitrust principle, since proof of a conspiracy is a threshold element of all Sherman Act §1 cases. It is particularly inappropriate in this case which presents a record of vigorous competition in the marketplace, the availability of other remedies for any grievance, and the record contains no facts which militate in favor of creating new antitrust principles.

Petitioners' Second Question Presented raises no cognizable legal issue or principle but instead simply repeats an argument rejected below, that the Magistrate Judge dismembered the proof, weighed competing inferences, and failed to draw inferences in favor of the Petitioners. After a *de novo* review of the record, the District Court reached the same conclusions as the Report as to the absence of proof of a conspiracy. In a *de novo* review, the Second Circuit rejected the same contentions as Petitioners now urge, finding that there were no instances in which the District Court drew inferences in favor of the defendants or ignored any evidence that would merit denial of summary judgment.

Simply put, Petitioners ask this Court to grant *certiorari* to evaluate the factual record for a fourth time.

III. THE BUSINESS AND THE ENTITIES INVOLVED DO NOT JUSTIFY FURTHER REVIEW OF THIS RECORD OR RAISE ANY ANTITRUST ISSUES

This case involves rival labor unions and companies that are engaged in the business of installing electrical wiring and tel-data equipment in new buildings or other major construction. Petitioners have never disputed that the business is highly competitive and they offered no proof of market share or market effect. There are dozens of electrical contracting firms which do wiring for general use and for tel-data, while some do only one or the other. The three Petitioners focus entirely on providing installation of wiring for tel-data. Their business model is to try to persuade building owners or general contractors to split the electrical wiring job and employ a firm limited to tel-data work alongside the electricians doing other wiring, by offering to do the tel-data phase of the work at a lower price. They charge less by using workers with limited training, who belong to a union (Communications Workers of America, "CWA") with significantly lower wage rates than workers belonging to Local 3, who do all phases of electrical work.

Petitioners proposed a geographic market defined to be coextensive with the area covered by Local 3 (*i.e.*, New York City, Westchester and part of Fairfield, Connecticut), whose members are fully qualified electrical workers. Earlier jurisdictional disputes

between Local 3 and the CWA were governed by the National Labor Relations Board ("NLRB") which addressed all such issues as they arose, and which continues to exercise its authority, as appropriate, with mixed results for Petitioners. The Petitioners were wildly successful in enhancing their sales and profits before, during and after the period covered by the Complaint. The lead plaintiff (USIS) secured many thousands of jobs (one executive said 9,000 over the past few years), was highly profitable, and its executives conceded that its CWA employees worked side-by-side with Local 3 electrical workers without incident on virtually all of these thousands of construction sites.

The foundation of Petitioners' case is the assumption that their lower prices should result in them being awarded every job on which they bid, so that any assignment which went to the Local 3 electrical contractor doing the general electrical work could plausibly be inferred to be attributable to some malevolent and illegal force. There was absolutely no proof of Local 3 involvement in the sales efforts by contractors which competed for business by claiming advantages for using Local 3 contractors, and no basis exists for inferring that there was joint action of any sort.

Despite the absence of proof of any conspiratorial behavior, and the existence of reasons for every choice made by building owners and general contractors, Petitioners argued that if a contractor using Local 3 workers persuaded its customer to select it for tel-data work, it was plausible to infer that it was a result of conspiratorial behavior orchestrated by the union

without proof of overt acts by Local 3. They argued that on summary judgment the Petitioners and the court should ignore all of the proof and economic analyses establishing the reasons some general contractors or owners might prefer to deal with: (i) a single electrical contractor for both the electrical wiring and tel-data work; (ii) an electrical contractor with which it had a long history; and (iii) an electrical contractor employing workers belonging to a union (Local 3) with good relations with other craft unions working on the job, including membership in the organizations of unions which were signatories to legally-approved agreements which guaranteed labor peace on jobsites with many different unions represented. The union to which Petitioners' workers belonged was not a signatory to these agreements, so that disputes among CWA workers and the many other unions on the jobsite were not subject to resolution under well established mechanisms which avoided jurisdictional issues.

Petitioners are quite facile in their aspersions about Local 3, but make no pretense of having offered any proof of any conduct by Local 3 or its involvement in any alleged conspiracy. Rather, if an unnamed worker allegedly exercised a contractual right to refuse to work overtime or there was any incident on a jobsite, it was contended by Petitioners that it should be attributed to a Local 3 member and then inferred to be a part of the plot to force a CWA contractor off the job and also inferred to be an act of Local 3 itself in furtherance of the conspiracy. There was no proof of anything other than some contractors aggressively competing against Petitioners at several sites and the "facts" summarized in the Petition purport to show only conduct by a few Local 3 contractors competing for isolated jobs.

The failure of proof is particularly glaring in view of the provisions of Section 6 of the Norris-LaGuardia Act, 29 U.S.C. §106, which precludes liability of a union for "unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." Petitioners made no effort to establish that Local 3's leadership or its governing groups had any knowledge or involvement in any of the alleged few incidents. The lower courts did not reach the issue of the application of the Norris-LaGuardia Act since there was no arguably conspiratorial conduct to attribute. The Magistrate Judge specifically noted that it was not necessary to address that statute, in view of the Petitioners' failure of proof (App. C, 52a, fn. 23).

The dispositions below reflect recognition and application of the universally accepted *Matsushita* standards for summary judgment. In its summary order, the Second Circuit specifically stated that "we find no instances in which the district court drew inferences in favor of the [Respondents] or ignored evidence that would merit the denial of summary judgment to them under the *Matsushita* standard" (App. A, 5a). The courts engaged in a searching and detailed analysis of the Petitioners' evidentiary submissions (App. C, 19a-29a, 10a and 3a), essentially in the order in which Petitioners submitted them, contrary to the baseless claim that the lower court improperly "dismembered" or compartmentalized Petitioners' evidence. Neither the applicable principles nor the findings below present issues requiring further review.

Instead of proof of involvement by Local 3 or anyone else in an alleged conspiracy, the Petitioners' "case" against Local 3 consisted of attacks based on events over seventy years ago and selected NLRB and district court determinations involving Local 3 unrelated to conspiracy or antitrust issues. These cases and proceedings were properly ruled inadmissible in a decision not appealed. *See U.S. Info. Systems, Inc. v. I.B.E.W. Local Union No. 3*, 2006 U.S. Dist. LEXIS 52938, at **52-57. Nevertheless, the same hyperbole and aspersions regarding Local 3 form the essence of this Petition. The irrelevant and inflammatory attacks on Local 3 (Pet. pp. 3-5), cannot substitute for Petitioners' lack of proof of conspiracy.

Illustratively, the first and most inflammatory story on which Petitioners rely (Pet. p. 10), is based on alleged statements by an employee of a contractor which successfully sought to keep tel-data work for itself. Without record citation or basis, the Petition falsely labels this contractor employee as "a Local 3 agent" (p. 10) (but not an officer) and ignores his motivation to keep this business for his employer.

In sum, Petitioers did not attempt to prove anything about Local 3 or explain how they had been so successful if this conspiracy existed. Similarly, they made no effort to refute the obvious fact that if their claims were true about the power and conduct of Local 3, then Petitioners would have no business at all and Local 3 contractors would have been awarded every single tel-data job. As one court found in an earlier case, Local 3 did not need a conspiracy to exclude members of a rival union. *See Building Industry Fund v. I.B.E.W. Local Union No.*

3, 992 F. Supp. 162, 181-82 (E.D.N.Y. 1996), *aff'd mem.*, 141 F.3d 1151 (2d Cir. 1998).

This record confirms there was no exclusion and no conspiracy in a vigorously competitive market. Petitioners had no proof of a conspiracy and their theory made no sense.

REASONS FOR DENYING THE PETITION

I. NO REASON EXISTS TO RECONSIDER *MATSUSHITA* OR ITS APPLICATION TO THIS CASE SINCE NO CIRCUIT HAS A VIEW CONTRARY TO THE PRINCIPLES APPLIED BELOW

A. There Is No Circuit Split.

It was properly recognized below that: (i) *Matsushita* and *Monsanto* limit the inferences which can be drawn in support of an effort to show the concerted action necessary to establish a Sherman Act §1 claim; (ii) conduct as consistent with competitive conduct as with conspiracy does not support an inference of an antitrust conspiracy; and (iii) a plaintiff opposing summary judgment must present proof that tends to exclude independent action (App. C, 39a-40a). The District Court applied these same principles and authorities in a *de novo* review which adopted the Report and granted summary judgment (App. B, 11a-12a). The Second Circuit, in a summary order, also conducted a *de novo* review and concluded that the District Court properly applied *Matsushita* and rejected the contention that *Kodak* altered *Matsushita*, citing

the confirmation of the *Matsushita* standards by this Court in *Twombly*, 550 U.S. at 554 (App. A, 4a):

> The [Petitioners] argue that the Supreme Court altered this ["tends to exclude"] standard in *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451 (1992), by stating that "*Matsushita* demands only that the non-moving party's inferences be reasonable in order to reach the jury," *id.* at 468. We disagree. This language explains the *Matsushita* standard. It does not alter it. This view is supported by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), where the Supreme Court cited *Matsushita* for the proposition that "at the summary judgment stage a [Sherman Act] §1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently," *id.* at 554.

The entire Second Circuit denied a request for *en banc* consideration. The principles applied below are well established, non-controversial and there is no conflict or other reason for them to be reconsidered.

Petitioners now contend that the Third and Seventh Circuits apply their reading of *Kodak* (without citing that Opinion) and have adopted a revised *Matsushita* standard. They also rely on older precedent from the Ninth Circuit, which Petitioners acknowledge has been "abrogated." (Pet. p. 26). A review of decisions in those Circuits, both cited by Petitioners and omitted, establish that Petitioners are incorrect and that the standard

articulated in *Matsushita* is universally applied with no Circuit conflict.

The Third Circuit recently confirmed that the *Monsanto* and *Matsushita* standards apply to limit permissible inferences of conspiracy, and require summary judgment if the challenged conduct is equally consistent with permissible conduct or can be explained by independent business judgment. In *In re: Insurance Brokerage Antitrust Litigation*, MDL No. 1663, 2010 U.S. App. LEXIS 17107, at **49-50 (3d Cir. Aug. 16, 2010), the Third Circuit engaged in a detailed analysis of *Twombly* with respect to its application at the pleading stage and at the summary judgment stage, observing, *inter alia*, that ". . . in order to enforce the Sherman Act's requirement of an agreement, the Supreme Court has required that 'a §1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.'"

Similarly, in *Cosmetic Gallery, Inc. v. Schoeneman Corporation*, 495 F3d 46, 51-52 (3d Cir. 2007), a group boycott case, the Third Circuit explicitly cited the general *Matsushita* standards *(i.e.*, "proof of a §1 conspiracy must include evidence tending to exclude the possibility of independent action" and "at the summary judgment stage a §1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently") and affirmed summary judgment on behalf of defendants, finding that the proffered proof to support an inferential conspiracy failed to exclude the possibility that the distributors acted independently. Moreover, in July 2010, the Third

Circuit reviewed the relevant authorities, noted the *Kodak* decision, and confirmed that the principles of *Matsushita* as applied below are clearly controlling. *See Race Times America, Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57 (3d Cir. 2010); *see also In re: Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999) (applying general *Matsushita* standard). Petitioners' suggestion of a conflict with the Third Circuit (Pet. pp. 24-25) based largely on the conclusion in *Petruzzi's IGA Supermarket, Inc. v. Darling–Delaware Co.*, 998 F.2d 1224 (3d Cir.), *cert denied*, *Moyer Packing Co. v. Petruzzi's IGA Supermarkets*, 510 U.S. 994 (1993), that the evidence in that record was sufficient to withstand summary judgment is clearly misplaced.

Miles Distributors, Inc. v. Specialty Construction Brands, Inc., 476 F.3d 442 (7th Cir. 2007) is the most recent published decision in the Seventh Circuit addressing the proper summary judgment standard in a Section 1 case. It cited these same principles of *Matsushita* to require that a plaintiff seeking to infer an antitrust conspiracy must provide proof which tends to exclude the possibility of unilateral conduct and that conduct which is consistent with permissible competition does not support an inference of conspiracy. *Monsanto* was there said to stand for the proposition that a conspiracy cannot be inferred from dealer complaints. *Id.* at 449. Notably, *Miles* is not mentioned in the Petition.

The few Seventh Circuit decisions authored by Judge Posner (Pet. pp. 22-23) do not remotely suggest that *Kodak* changed, refined or in any way altered the summary judgment standards enunciated in

Matsushita and *Monsanto*. The determinations of the adequacy of the proof in those cases do not suggest the existence of any conflict between the Seventh Circuit and any of the other Circuits, which all adhere to the *Matsushita* standard.

Similarly, the Eleventh Circuit in *Williamson Oil Co., Inc. v. Phillip Morris, USA*, 346 F.3d 1287 (11th Cir. 2003) (Pet. pp. 8-9) and the Ninth Circuit in *In re: Citric Acid Litigation*, 191 F.3d 1090 (9th Cir. 1999), *cert. denied, Gangi Bros. Packing Co. v. Cargill, Inc.*, 529 U.S. 1037 (2000) (Pet. p. 26) confirm that any suggestion that earlier opinions in those Circuits cut back on *Matsushita* have been "abrogated." In fact, *Citric Acid* explicitly rejected an argument that *Matsushita* is of limited applicability in Section 1 inferential conspiracy cases:

> The requirement that a plaintiff who relies solely on circumstantial evidence of conspiracy as [plaintiff] does – must produce evidence tending to exclude the possibility that defendants acted independently follows directly from the Supreme Court's opinion in *Matsushita* and is, as we explained, well-established in both this circuit (citing cases) as well as in our sister circuits (citing cases from the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits). 191 F.3d at 1096.

The commentators do not see any doubt that the principles are clear and not controversial: "When the evidence is in equipoise . . . summary judgment will be granted [to the defendant]." II P. Areeda & H. Hovencamp, ANTITRUST LAW 70 (1995).

B. *Kodak* Did Not Change The Law On Proof Of Conspiracy.

The opinions cited in the Section above were decided well after *Kodak*, and none of these Courts found anything in *Kodak* which required clarification or militated against the application of *Matsushita* as applied by the Courts in this case. Petitioners cite no opinion which finds *Matsushita* unclear, or supports their contention that *Kodak* somehow signaled a departure from the universally applied principles of *Matsushita* when addressing an effort to infer a conspiracy. As recently as 2007 in *Twombly*, this Court unambiguously pointed to *Matsushita* as the hedge against false inferences of conspiracy at the summary judgment stage. 550 U.S. at 554. The Petitioners' assertion (Pet. pp. 16-19) that *Kodak* affected the clear mandate of *Matsushita* is not supported by any authority. It was previously raised and rejected by the Eleventh Circuit in *Williamson* and the Fourth Circuit in *Merck-Medco Managed Care, LLC v. Rite-Aid Corp.*, No. 98-2847, 1999 U.S. App. LEXIS 21487, at *21 (4th Cir. Sept. 7, 1999), before it was rejected by the Second Circuit below. There is thus no precedent or logic which would read *Kodak* (a tying case) to affect the law on inference of a conspiracy.

Twombly did not mention *Kodak* in pointing to *Matsushita* as controlling. Certainly there is no conflict requiring resolution. As noted, the opinions by Judge Posner relied upon by Petitioners (Pet. pp. 22-23) do not suggest that *Kodak* changed *Matsushita*.

Petitioners below claimed that *Kodak* undercut the obligations on a plaintiff articulated in *Matsushita*, so

that a plaintiff's failure or inability to respond to the overwhelming proof against the claim of conspiracy was not relevant on summary judgment. The "revision" of *Matsushita* which Petitioners now urge, limiting its application to "implausible" conspiracies that are socially redeemable, is equally baseless and not consistent with *Kodak* or *Twombly*. It was not urged below. In fact, their new theory would actually impose on Fed. R. Civ. P. Rule 56 a presumption no longer even applied under Rule 12 (b)(6). There is simply no judicial authority or economic justification which suggests that this Court should address such a change in *Matsushita*.

II. THE REVIEW OF THE FACTUAL RECORD AND THE CONCLUSIONS REACHED WERE CONSISTENT WITH THE PROOF AND APPLICABLE PRECEDENT WHICH NEED NOT BE RECONSIDERED FOR THESE PETITIONERS

A. *Matsushita* Was Properly Applied After Repeated Careful Reviews Of The Proof.

The detailed Report below reflects consideration of both the circumstantial evidence and the specific events relied on by Petitioners to support the inference of a conspiracy (App. C, 38a – 52a). In recommending summary judgment, the Report states, *inter alia*: "The plaintiffs offer no evidence that representatives of Local 3 and the defendant contractors discussed the possibility of winning contracts by threatening to engage in vandalism or withhold overtime at that meeting or at any other time." (App. C, 44a). Similarly, there was no evidence found from which it might properly be inferred that any contractor-Respondent had conspired with Local 3 or anyone else.

The conclusion of "no evidence" was not based in any way upon a usurpation of the role of fact finder and did not require a conclusion that there was no misconduct by anyone. The critical conclusion was that there was no proof of concerted action (App. C, 51a-52a). The finding of "no proof" is a legal conclusion and not a weighing of evidence. The District Judge conducted a *de novo* review and also found that the possibility of actions by some individuals could not substitute for the absence of proof of a conspiracy involving Local 3 (App. B, 11a-12a). The Court of Appeals also conducted a *de novo* review and found that the proper summary judgment standards had been applied. The proof was so inadequate, it was not even deemed necessary (App. C, 52a, n.23) to address the application of the Norris-LaGuardia Act which would preclude liability of the union where the only alleged actors are individuals who were not shown to be carrying out official union policies. The "standard" used by all of the courts in this case is drawn right from *Matsushita* and, as shown above, is consistent with the universal interpretation of that Opinion.

B. The Conclusions Reached By All Five Jurists Below Upon Their Review Of The Factual Record Were Consistent With The Proof And Applicable Precedent And Do Not Merit Reconsideration By This Court.

In this Petition, as they did in the Courts below, Petitioners attempt to compensate for the lack of proof of conspiratorial behavior by the use of unseemly labels and charges against Local 3 which have nothing to do with proof of a conspiracy. Clearly it was, and continues

to be, the Petitioners' hope to inflame the Courts and a jury against a labor union by attacking the union of 30,000 hard working members and calling its conduct criminal or otherwise subject to condemnation (*see, e.g.*, Pet. pp. 2-5, 35-40).

There is, however, no basis or need to undermine the requirement of proof of conspiratorial behavior for a Sherman Act §1 case as Petitioners urge. The record confirms there was no conspiracy or effect in any market which requires scrutiny under the antitrust laws, and those conclusions are not overcome by invective aimed at Local 3. The attacks on Local 3 based on irrelevant and inadmissible NLRB and district court decisions (Pet. p. 5) – the most recent of those cited was twenty-two years ago – is not tenable but certainly these remote events have nothing to do with conspiracy or summary judgment. As noted earlier, in an August 2006 Opinion, the Magistrate Judge addressed most of these decisions and decrees and properly held them inadmissible. *USIS v. I.B.E.W. Local Union No. 3*, 2006 U.S. Dist. LEXIS 52938, at **52-57. The Petitioners nonetheless improperly cited these earlier opinions as justifying some inference of conspiracy against Local 3. In the Petition they continue that effort without mention of the August 2006 Opinion, and without providing any basis for flouting or changing the ruling against their use which Petitioners did not seek to have reviewed by the District Court. They waived any effort to rely on this excluded "proof."

Similarly, the Petition presents no issue for this Court by its repeated shrill description of conduct, none of which was proven, as "illegal" or criminal. These

unproven claims were referred to by the Report, *arguendo*, for the narrow proposition that even a claim charging unilateral conduct that was unlawful under some other statute does not eliminate the need for a plaintiff to prove conspiracy (App. C, 51a-52a). The rejection of Petitioners' reliance on such a claim and the finding of "no evidence" reflect a proper legal conclusion, without resolving any factual issues or agreeing with Petitioners' claims. The availability of other remedies for charges of unfair labor practices or penal violations confirms that there is no issue for this Court which would justify taking a case to consider expansion of the antitrust laws or elimination of the need to show a conspiracy. *See, e.g., Sanderson v. Culligan International Co.*, 415 F.3d 620, 623 (7th Cir. 2005); *Reading International Inc. v. Oaktree Capital Management LLC*, No. 03-1895, 2007 U.S. Dist. LEXIS 504, at *24 (S.D.N.Y. Jan. 8, 2007) ("under section 1 it is irrelevant if [an antitrust defendant] acted like a bully, as long as it did so independently"). No matter how egregious Petitioners may consider their charges, there is simply no need or reason to "clarify" *Matsushita* to introduce scrutiny of allegations of character or prior bad acts into the summary judgment deliberations where the issue is proof of conspiracy.

C. The "Expert Opinion" Adds Nothing.

In an attempt to mask their glaring lack of evidence and attack the Courts' carefully-considered opinions, Petitioners again attempt to rely on their expert to prove the existence of a conspiracy (Pet. pp. 12-14). Yet, it is well-settled that "[e]xpert testimony is useful as a guide to interpreting market facts, but it is not a

substitute for them." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993); *see also Citric Acid*, 191 F.3d at 1102 (rejecting the use of expert proof submitted by plaintiffs opposing a motion for summary judgment in order to prove facts supporting the alleged conspiracy).

Contrary to their argument that their expert was "*Daubert* approved" and had properly "concluded that Local 3, acting in concert with defendant electrical contractors, engaged in anticompetitive conduct..." (Pet. p. 12), the extensive proceedings addressed to his proposed testimony resulted in a ruling that barred Petitioners from offering or relying on such a conclusion, while limiting Dr. Dunbar to testifying about economics of market behavior. *See U.S. Information Systems, Inc. v. I.B.E.W. Local Union No. 3*, 313 F. Supp.2d 213, 240-41 (S.D.N.Y. 2004). In fact, rather than being "*Daubert* approved" the expert was *Daubert*-limited. His earlier effort to testify about conduct was abandoned, and the Court curiously gave him a second chance with limits which Petitioners now propose to ignore.

Moreover, the Second Circuit correctly observed that the Courts below "rejected the views of [Petitioners'] expert" (App. A, 5a), which is not an issue presented for review.

III. THE NON-PRECEDENTIAL SUMMARY ORDER BELOW CANNOT CREATE A CONFLICT AMONG THE COURTS OF APPEALS

The Petition seeks review of a Second Circuit panel's "Summary Order." But pursuant to Second Circuit rules, summary orders are issued only when the panel unanimously concludes that "no jurisprudential purpose is served by an opinion." Second Cir. IOP R. 32.1.1. Thus, far from presenting a "decision in conflict with the decision of another United States court of appeals," *cf.* Sup. Ct. R. 10(a), the disposition below controls only the parties to the proceeding. It does not — and cannot — conflict with decisions from other courts because it announces no ongoing rule of law. In short, an order without precedential effect cannot create or evidence a conflict with another court of appeals.

Apparently mindful of the constrained effect of the summary order, Petitioners omit to disclose that the Second Circuit Order lacks precedential value. According to Second Circuit Internal Operating Procedures, a reproduction of the order must advertise its limited effect with the words: "*Rulings by summary order do not have precedential effect . . . .*" Second Cir. IOP R. 32.1.1 (emphasis added). Petitioners have failed to comply with this rule and reproduced in their Appendix a copy of the Summary Order without the legend. *See* App. A. Nor have they disclosed anywhere in their Petition that the Second Circuit Order has no precedential effect.

Moreover, the Petitioners' hypothetical conflict between the Circuits not only proves ill-conceived as a matter of law, *supra* Section I, but also fails as a matter

of practice. If the Circuits were truly split on the meaning of *Matsushita*, an unsigned summary order fails to provide a "compelling" instrument for resolving such an important dispute. *Cf.* Sup. Ct. R. 10.

CONCLUSION

The Petitioners have presented no persuasive reason for granting a writ of *certiorari*. The disposition below involves only a unique fact-bound application of settled law with no implication beyond the parameters of this case. The Petition should be denied.

Respectfully submitted,

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